The Influence of the Metropolis on the Concepts, Rules and Institutions Relating to Property

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A paper prepared for the
Bicentennial celebration of Columbia University
to be presented at a conference on the topic
"The Metropolis in Modern Life"
January 8, 1954

Acknowledgment

Charles G. Dalton and Edward H. Snyder assisted in the research embodied in this paper and in the preparation of some of the charts and compilations used herein.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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CHAPTER ONE

THE END RESULT

The conclusions reached

To facilitate consideration of what follows, the conclusions and point of view, which in an orderly presentation normally would be put at the end of the paper, are placed here, and repeated there. They are:

1. The influence of the metropolis upon the concepts, rules and institutions relating to property is not unique. It follows the historical pattern of evolutionary adaptation of the law to the interests of the group to which it is applicable.

2. That influence results largely from the pressures of self-interest of the majority of the people who live in urban areas.

3. Primarily, it is reflected through legislative and judicial processes at National, State and local levels.

4. Traditional legislative techniques provide grants of power by the States to their local municipalities, with local exercise of that power manifesting many of the areas and details of influence.

5. The United States Supreme Court's interpretations of the general welfare and commerce clauses of the Federal Constitution have resulted in the Federal Government exercising in many different ways hitherto unused powers affecting the concepts and institutions relating to property.

6. In addition to legislation by legislative bodies and sometimes by courts, administrative agencies on Federal, State and local levels have had an important and unprecedented part in developing rules and imposing controls which affect realty.

7. The influence of the metropolis has resulted in the intervention of National, State and local governments into areas which formerly were those of private business and of individual free action.

8. The circumstance that many people have gathered in cities has created some new concepts, rules and institutions relating to property, to supplement the traditional ones which appertain to an agrarian society.

9. Although the growth of the metropolis has created some new concepts, rules and institutions relating to property, it also has put to use more intensive and extensive and somewhat changed concepts, rules and institutions which also are found in an agrarian society.

10. The chief influence of the metropolis on the concepts, rules and institutions relating to property has been a progressive diminution of individual free action concerning private property rights.

11. This has resulted from a corresponding enlargement of social control plus governmental regulation and governmental participation in transactions affecting real property.

12. These influences probably will continue and intensify as the urban population increases, with the result that the long-range effect will be a further lessening of free choices by the individual property owner and a greater measure of social control and governmental participation in affairs relating to property.

13. This process has proceeded and doubtless will continue to proceed at a gradual but uneven rate both as to time and as to places. Its over-all progress will depend upon the social climate of the times. In the words of Mr. Justice Cardozo:

> "This work of modification is gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and the pressure of the moving glacier."[1]

The scope of this paper

The law of property constitutes a substantial portion of all American law.[2] To discover and trace all of the influences of the metropolis into and through each segment of that tremendous field would be a major task for a group of legal historians and social scientists. The task necessarily would be encyclopedic in character. Therefore, this paper is limited to a much narrower scope. It is neither a treatise covering the historical developments or ramifications of the areas of law it touches, a prophecy of things to come, nor a clarion call for improvements in the law, for changed social objectives or more enlightened or complete planning, or for more effective controls to enforce upon the people who live in crowded cities a fuller and richer life. It purports to go no further than to make an objective and unpretentious survey of the field, to furnish some documented background for limited conclusions, and to state a point of view as to what broad legal principles affecting property have been shaped by the pressures of the metropolis, have influenced the development of that law and seem to have the vitality to further affect the field under inquiry.

1. Hon. Benjamin N. Cardozo, *The Nature of the Judicial Process*, p. 25.
2. *Restatement of the Law of Property*, Vol. I, p. 1.

No two persons undertaking so large an assignment can be expected to review the same legal areas, select the same illustrations, or arrive at the same conclusions. The most that has been attempted is to point out a few of the identifiable straws which the persistent winds of change send rushing by in a field generally reputed to be dry and dusty and unchanging.

The volume of Federal and State statutes, municipal ordinances, reported judicial opinions, administrative rulings, and legal literature which has a bearing upon the subject is too vast to permit detailed analysis. The aggregate printed matter involved includes thousands of volumes.[3] Consequently this inquiry has been conducted on a sampling basis, with emphasis on examples of obvious character.

The forces to be considered

The concepts, rules and institutions relating to property are shaped by the same kinds of forces and pressures which fashion other aspects of the law from generation to generation. And they are as fluid. The law grows and changes and adapts itself to new situations primarily because people insist upon their interests and wishes being accommodated. When they want to do something badly enough, ultimately ways for doing it develop. If established and accepted patterns of legal action are available, they are used. If not, over a period of time some adaptation occurs. The methods used to accomplish changes are not always the same. Ordinarily a persistent need results in a new statute or local ordinance, authorizing the desired action. Witness the enactment of zoning and community conservation acts and a host of Federal acts in the field of housing. Sometimes actions which have been taken, even though there was no statutory foundation for them, or they were questionable under existing doctrines, are ratified by legislative enactment. Sometimes such actions furnish the basis for a statute which solemnly embodies the debatable procedure as though it always had been accepted. Sometimes judicial action gives new approval to what had been frowned on, or judicial legislation changes the course of the law. This happened when the United States Supreme Court redetermined the powers of the Federal Government by adopting new concepts of the interstate commerce and general welfare clauses of the Constitution.

3. The law library of Harvard Law School contains 786,000 volumes; that of the Chicago Law Institute contains approximately 112,000 volumes; and of New York University Law School, 120,000 volumes. *Law Libraries in the United States and Canada* (1952).

Frequently the desired end is accomplished by contract or custom independent of legislation or litigation. What people actually do in their everyday activities concerning real estate titles and kindred matters is as influential a factor of change as a statute or judicial legislation. And sometimes legal means are used to accomplish a given end which are not precisely adapted to the purpose. When this occurs, it causes the legal scholars and jurists to have philosophical dissentions. Sometimes methods used, though less than ideal, hold together sufficiently to accomplish a desired end, escaping challenge and ultimately attaining the respectability of age and custom. It seems true that where a substantial number of an urban population over a period of time has a will, before long, a way develops. Where a way which works fairly well once has been found, there is a precedent. Ultimately the way and the precedent are fitted into the pattern of city living and into the law and then continue to grow and change and adapt themselves to the new conditions which are characteristic of the metropolis.

Is there an obvious relationship between the growth of cities and the increase in laws?

In a study of the influence of the metropolis on the concepts, rules and institutions relating to property, necessarily the first question is, "Has there been a discernible influence which arises from such a source?" Large numbers of people live in cities. Millions of parcels of real estate are located in metropolitan areas and millions of persons have acquired and enjoy property rights in that real estate. Meanwhile the law continues to be in a state of relentless evolution[4]—evolution through legislation, through judicial decision, and by the acts and customs of people. But, merely because there is a common time element between the growth of cities and of measures to regulate and control people's lives and property, it does not necessarily follow that all of the changes which have occurred in legal rights and theories during a period of urban growth are attributable to the influence of the metropolis. The single factor that more people have come to live in urban communities

4. Charles M. Haar, *Land Planning Law in a Free Society* (Harvard Un. Press, 1951) p. 1, says:

"But it is also true that without the institution of law, the institution of land ownership is meaningless. As was pointed out by Jeremy Bentham: 'Property rights and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.' This simple statement calls attention to the evolutionary aspect of rights in land. The bundle of rights labeled 'ownership' consists only of those rights which the law at any one time will enforce.

"It has likewise been recognized that the landowner's rights are not immutable, that they can, have been and must be continuously reshaped to meet changing needs."

and have become subject to a great number of statutes, ordinances, and administrative regulations and to changing concepts of the roles of private rights and social interference with those rights of itself is not inconsistent with the orderly growth of law which has been in process for centuries. Neither does it rule out the possibility that in some areas there is an obvious relationship of cause and effect.

If we agree with Mr. Justice Cardozo that "The final cause of law is the welfare of society,"[5] and with Mr. Justice Holmes that "a page of history is worth a volume of logic,"[6] it would seem obvious that the gathering together of people in cities has had and must have an influence upon the legal concepts, rules and institutions relating to property. But that assumption does not shed light on the areas in which such influences have become manifest, the extent to which laws being applied in an urban society cling to concepts and relationships which existed before metropolitan areas developed, nor to the time lag between old doctrines and new or changed applications of those doctrines.

The fields of law involved in the inquiry

In both an agrarian society and in an urban society there are vast areas of legislation and legal doctrine equally applicable to both kinds of societies and not exclusively attributable to the influence of either. The fields of criminal law, taxation, judicial procedure, descent and distribution of property, the laws concerning marriage and divorce, adoption of children, wills, and deeds and mortgages, the laws of banking, corporations, negotiable instruments and commercial transactions, of motor vehicles and educational institutions, and a great multitude of other activities, apply equally to city and country communities and residents, and owe their present status to factors other than urban conditions.

But there are other legal fields which predominantly concern either rural areas and activities, or city problems. The laws applicable to drainage, water rights, control of noxious weeds, farm fences, agriculture and horticulture of themselves do not suggest that the problems of the teeming metropolis have shaped their present form. On the other hand, the very words, slum clearance, zoning, building codes, private restrictive agreements, city planning, rent control, air rights, co-operative apartments, and many aspects of the law of landlord and tenant, instantly call to mind the confusions, antagonistic interests, and pres-

5. *The Nature of the Judicial Process*, p. 66.
6. *N. Y. Trust Co.* v. *Eisner* (1921), 256 U. S. 345, 349.

sures which build up in a metropolis. These shape the permitted actions of its people. They become reflected in the legislative acts of its officials, in the actions of public agencies which make its decisions and in the judgments of the courts which decide its controversies.

Sense in which "property" and "institutions" are used

"Property" is one of the confusing legal words which commonly are used with more than one meaning[7]. Therefore, it should be stated at the outset that "property" is used throughout this paper as signifying the sum of all of the rights and powers incident to the ownership of real estate. Concerning it, Dr. Ernest M. Fisher of Columbia University has written:

> "Transactions in urban real estate markets consist of sales and purchases, exchanges and transfers, and pledges of the rights to the exclusive control and use of urban land and improvements. It is these rights, not the actual land and improvements, which constitute property of economic significance. From land and improvements comes a flow of varied and numerous services or utilities essential to civilized life. These may include not only mere shelter but also a pleasant environment, the convenience of rapid communication, accessibility to places of employment and shopping facilities, and other features of community life. They may consist of such intangible satisfactions as a good address, or proximity to the great or near-great. The exclusive right to enjoy or control any or all of these services for any period of time constitutes property."[8]

"Institutions" is another word which conveys different meanings to people with differing backgrounds. Here it is used in its ordinary dictionary meaning of a practice, law or custom which is a material and persistent element in the life or culture of an organized social group.[9]

7. In the American Law Institute's *Restatement of the Law of Property*, Vol. I, p. 3, it is said: "The word 'property' is used sometimes to denote the thing with respect to which legal relations between persons exist and sometimes to denote the legal relations. * * The word 'property' is used * * to denote legal relations between persons with respect to a thing."

8. *Urban Real Estate Markets: Characteristics and Financing*, p. 1, (1951).

9. See "Law and The Social Sciences—Especially Sociology," by Karl N. Llewellyn, 62 Harvard Law Rev. 1286, 1289, where the author says: "The central aspect of an institution is organized activity, activity organized around the cleaning up of some job."

Legal areas which furnish clear illustrations of the influence of the metropolis

The illustrations chosen for this paper include two general types, those which long have been found in the statute books and decisions of the courts, and those which more recently have developed from business practices and local customs.

In the first group are the police power in an urban society, the types of statutes and municipal ordinances which have evolved in populous communities, social controls of land use in cities as demonstrated by zoning laws and conservation acts, the maze of statutes and institutions which spring from the Federal Government in the area of housing, slum clearance and the alphabetical agencies having to do with realty, and some phases of the law of landlord and tenant. In the second group are such everyday affairs as the techniques devised for using air rights, for holding and conveying real estate titles involved in syndicate and other group operations, the philosophical problems connected with the legal relationships incident to co-operative apartments, the course of private restrictive agreements, and the practical efforts which are being made to find realistic title standards which will facilitate rather than hinder the marketing of city real estate and the making of mortgage loans.

Probably the clearest illustrations of the influence of the metropolis upon the concepts, rules and institutions relating to property are to be found in those laws which have developed for the purpose of controlling the orderly growth of cities, which control the utilization of privately-owned urban land and provide for the clearance of the slums which inevitably seem to come into existence in cities, and for the attempted salvation of blighted neighborhoods which have succumbed to those forces.

All of these involve the fundamental of the exercise of its police power by the State.

CHAPTER TWO

THE POLICE POWER IN AN URBAN SOCIETY

The police power

The gathering together of millions of people into cities has built up many pressures unknown to rural communities.[1] All living under a constitutional form of government requires a constant adjustment between the rights and freedom of choice of the individual and the overriding limitation found in the concept that the welfare of the entire public takes precedence over the individual's right to exercise uncontrolled freedom of action. When large masses of people live and work in densely populated urban areas, this adjustment furnishes acute and delicate problems. Not the least of these problems is found in the pressures being constantly exerted upon the legal concept of the State's police power. Until comparatively recently, the principle involved in the State's exercise of its police power, while not statically defined, ordinarily was stated with careful limitations and sparingly applied by the courts.

The traditional doctrine

The traditional doctrine long ago was stated by the United States Supreme Court as follows:

> "When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private, * * * but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not necessarily to injure another. This is the very essence of government, and has found expression in the maxim

1. In *People* v. *City of Chicago* (1952), 413 Ill. 83, 108 N. E. 2d 16, 21, it is said: "It is only in comparatively recent times that the world has experienced such tremendous concentrations of population as we find in our modern cities, or the disastrous and calamitous effect that modern war, with all of its lethal and destructive devices, may inflict upon the civilian population."

'*sic utere tuo ut alienum non laedas.*' From this source come the police powers * * *."[2]

In applying these principles to changing circumstances common to both urban and agrarian societies, the courts have had little difficulty in applying to varying factual situations the fundamental doctrine that the police power extends to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the State, and that it may be exercised in the interest of public morals and safety and for the promotion of the general welfare. Even in the earlier cases affecting urban living the problem was not overly complex. Thus, in the famous *Slaughter-House* cases, the United States Supreme Court cited Chancellor Kent as saying:

> " 'Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all * * * be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought to so use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community.' "[3]

Judicial problems in this area become more acute as the police power is applied to the complexities resulting from great numbers of people living in a comparatively small area.

The police power need not be constitutionally delegated, for it is inherently necessary to the effective conduct and maintenance of government. The authority of the States to enact such laws as they deem reasonably necessary to promote the public health, morals, safety, and general welfare comprehends a wide range of judgment and discretion in determining the matters which are of sufficiently general importance to be subject to State regulation and administration. The limitations of the Federal Constitution do not deny to the States the power to establish all regulations reasonably necessary to advance and secure the health, morals, safety and general welfare of the community.[4]

2. *Munn* v. *Illinois* (1876), 94 U. S. 113, 124, 125; Cooley, Thomas M., *A Treatise on the Constitutional Limitations*, Vol. II, p. 1225: " 'This police power of the State,' says another eminent judge, 'extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State according to the maxim, Sic utere tuo ut alienum non laedas, which, being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which everyone may so use his own as not to injure others.' " Citing Redfield, Ch. J., in *Thorpe* v. *Rutland & Burlington R. R. Co.*, 27 Vt. 140, 149.

3. (1872), 16 Wal. 36, 62, 63.

4. *People* v. *City of Chicago* (1952), 413 Ill. 83, 108 N. E. 2d 16, 21.

Uncompensated obedience

An important aspect of the exercise of the police power is that no compensation is paid by the State or collectible by a property owner because of limitations imposed upon the free use of his property where those limitations are within the police power. Section I of the Fourteenth Amendment to the Federal Constitution, prohibiting the taking of property without just compensation, does not prohibit the exercise of the police power. The United States Supreme Court has said:

> "* * uncompensated obedience to a regulation enacted for the public safety under the police power of the State was not taking property without due compensation. * * * [The constitutional prohibition against the taking of private property without compensation] 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments * *' ".[5]

Even in the face of a great financial loss, the police power is upheld. Private loss will not be permitted to impede a proper exercise of that power because the well being of the people is more important.[6]

The essence of the doctrine

The police power involves two conflicting concepts. One is that the State has power to make regulations to promote the health, peace, morals, education and good order of the people even though in so doing individual rights have to be sacrificed to the common good.[7] The other,

5. *C. B. & Q. Railway* v. *Drainage Comm'rs* (1906), 200 U. S. 561, 591, 594.

6. *Hadacheck* v. *Los Angeles* (1915), 239 U. S. 394, 410. In a modern English case, it is said: "But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbor becomes in law, you must not injure your neighbor." *Donoghue* v. *Stevenson* (1932), A. C. 562, 580, per Lord Atkin.

7. In *People* v. *Rosehill Cemetery* (1929), 334 Ill. 555, 562, 166 N. E. 112, 114, the court said: "The natural right which every citizen possesses to use his property as he desires is necessarily subject to the limitation that such use shall not injure others. All uses of property or courses of conduct which are injurious to the public health, morals, or safety may be prohibited by the State, although the exercise of the power may result in inconvenience or loss to individuals. In this respect individual rights must yield to the higher rights of the public. The power that the State may exercise in this regard is the overruling law of necessity, and is founded upon the maxim *salus populi est suprema lex*. The existence and exercise of this power are an essential attribute of sovereignty, and the establishment of government presupposes that the individual citizen surrenders all private rights the exercise of which would prove hurtful to the citizens generally. *Mugler* v. *Kansas*, 123 U. S. 623; *Haller Sign Works* v. *Training School*, 249 Ill. 436; *City of Chicago* v. *Rogers Park Water Co.*, 214 id. 212."

and the inseparable companion of the first, is that individual rights and freedom of action are so basic and important that a legislative act, the effect of which would be to deprive a citizen of property rights, cannot be sustained in the courts under the police power unless the public health, comfort, safety or welfare demanded such enactment, and there is some logical connection between the object to be accomplished by the legislation and the means prescribed to accomplish that end.[8]

It seems a safe assumption that cases involving the police power, decided by courts of last resort, more often than not originate in the problems created by the crowding of urban living. But even in the days of maximum individual free action, under the police power, privately-owned buildings which were a menace to public health[9] or which were

8. *People* v. *City of Chicago* (1913), 261 Ill. 16, 20, 21, 103 N. E. 609, 49 L. R. A., N. S. 438: "But even if the municipality is clothed with the whole police power of the State, it would still not have the power to deprive a citizen of valuable property rights under the guise of prohibiting or regulating some business or occupation that has no tendency whatever to injure the public health or public morals or interfere with the general welfare. An act of the legislature which deprives the citizen of his liberty or property rights cannot be sustained under the police power unless the public health, comfort, safety or welfare demands such enactment, (*Ruhstrat* v. *People*, 185 Ill. 133; *Bailey* v. *People*, 190 id. 28; *Bessette* v. *People*, 193 id. 334) and there must be some logical connection between the object to be accomplished by such legislation and the means prescribed to accomplish that end. The owner of property has the constitutional right to make any use of it he desires, so long as he does not endanger or threaten the safety, health and comfort or general welfare of the public. This right cannot be wholly taken away or limited by the State except in so far as it may become necessary for individual rights to yield to the higher and greater law of the best interest of the public."

9. *Sings* v. *City of Joliet* (1908), 237 Ill. 300, 309, 86 N. E. 663, 665, involved the destruction of a house ridden with disease germs. The court said: "It is next insisted that before the property was actually destroyed the owners thereof were entitled to have a day in court, where the question whether the property was, in fact, a nuisance might be adjudicated before the building was destroyed. In the exercise of the police power the command 'so use your own property as not to injure others,' and the maxim 'the safety of the people is the supreme law' are to be observed and given effect. (*City of Chicago* v. *Gunning System*, 214 Ill. 628.) If in every emergency the owner of the property the destruction of which is deemed necessary must be given a hearing, the exercise of the police power would in many instances be so delayed that serious injury to public health and other public interests would result. In *King* v. *Davenport*, 98 Ill. 305, in considering a like question, the following language was quoted with approval (p. 313): 'In the exercise of this [police] power the legislature may not only provide that certain kinds of property (either absolutely or when held in such a manner or under such circumstances as to be injurious, dangerous or noxious,) may be seized and confiscated upon legal process after notice and hearing, but may also, when necessary to insure the public safety, authorize them to be summarily destroyed by the municipal authorities without previous notice to the owner, as in the familiar cases of pulling down buildings to prevent the spreading of a conflagration or the impending fall of the buildings themselves, throwing overboard decaying or infected food, or abating other nuisances dangerous to health.' "

Miller v. *Schoene* (1928), 276 U. S. 272, 279, 280, involved the destruction of infectious trees. The court said: "And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."

unsafe and constituted a fire hazard[10] could be demolished by the State without compensation to the owner. The doctrine even permitted a private residence to be destroyed without compensation to prevent the spread of fire and prevent a general conflagration[11] or the destruction of property to prevent flood damage to adjoining property.[12]

In earlier legal decisions emphasis was laid upon the basic concept that the owner of property has the constitutional right to make any use of it he desires, so long as he does not endanger or threaten the safety, health and comfort or general welfare of the public. The desirable end was individual freedom of action, not prohibitions of free choice.[13] However, even then the line was clearly drawn against such municipal regulation as prohibiting the location of a retail store in a residence

10. *New England Trust Co.* v. *City of Boston* (1938), 300 Mass. 321, 15 N. E. 2d 255.

11. The court said: "* * * the law in force there was and is the old common law, under which, as is well known, no recovery can be had for property of the citizen destroyed to prevent the spread of fire." *Page* v. *Town of Warrenton* (1913), 210 Fed. 431, 433.

12. In *Aitken* v. *Village of Wells River* (1898), 70 Vt. 308, 40 Atl. 829, 830, 41 L. R. A. 566, 67 Ann. St. Rep. 672, which involved destruction of property to prevent flood damage to adjoining property, the court said: "The plaintiff contends that this was a taking of his property for public use by an exercise of the right of eminent domain; that the trustees had a right, in the circumstances, to take it as they did, and therein were acting within the scope of their authority; that therefore he is entitled, under the constitution to compensation from the village, and, as the taking was without compensation, that the village is liable for this action. But this proposition cannot be maintained, for this was not a taking of the plaintiff's property for a public use, in the sense contended for, but a destruction of it to avert an imminent public injury, which is a different thing from taking by the right of eminent domain, and in no legal sense an exercise of that right, but stands on entirely different ground, namely, on the ground of necessity, or, more properly speaking, on the ground of the police power of the state, whereas the right of eminent domain stands on constitutional grounds."

13. *Scott* v. *Frazier* (1919), 258 Fed. 669, 678: "Prior to 1885 that power was restricted by American courts to the public safety, health, and morals." See also *People* v. *City of Chicago* (1913), 261 Ill. 16, 20, 103 N. E. 609, 49 L. R. A., N. S. 438, note 8 *ante*.

In *Spann* v. *City of Dallas* (1921), 111 Tex. 350, 235 S. W. 513, 19 A. L. R. 1387, 1392, it was said: "But it is not the law of this land that a man may be deprived of the lawful use of his property because his tastes are not in accord with those of his neighbors. The law is that he may use it as he chooses, regardless of their tastes, if in its use he does not harm them. Under the common law and in a free country a man has the unqualified right to erect upon his land nonhazardous buildings in keeping with his own taste and according to his own convenience and means, without regard to whether they conform in size or appearance to other structures in the same vicinity, even though they may tend to depreciate the value of surrounding improved and unimproved property. *Bostock* v. *Sams*, 95 Md. 400, 59 L. R. A. 282, 93 Am. St. Rep. 394, 52 Atl. 665.

"It would be tyranny to say to a poor man who happens to own a lot within a residence district of palatial structures, and his title subject to no servitude, that he could not erect a humble home upon it suited to his means, or that any residence he might erect must equal in grandeur those about it. Under his constitutional

area,[14] or against such a location without the frontage consents of a majority of the property owners on both sides of the street in the block in which the store was to be[15] or against regulations based upon aesthetic considerations.[16]

Its elasticity

The most notable aspect of the legal concept of police power has been its elasticity, its ability to change and grow and adapt itself to new

rights he could erect such a structure as he pleased, so long as it was not hazardous to others. It might proclaim his poverty; it might advertise the humbleness of his station; it might stand as a speaking contrast between his financial rank and that of his neighbors. Yet it would be his 'castle'; and the Constitution would shield him in its ownership and in its use.

"If the citizen is not to be left free to determine the architecture of his own house, and the lawful and uninjurious use to which he will put it; if he is not to be permitted to improve his land as he chooses without hurt to his neighbors; if, by law, he is to be allowed to do these things only as officials or the public shall decree, or as may for the time suit the taste of a part of the community, the law might as well deal candidly with him and assert that he holds his property altogether at public sufferance. It might as well prescribe the kind of clothes he and his family shall wear and the sort of food they shall eat. Some people are as much offended by the clothes and diet of other people as they are by the style of their houses. As a great judge has warned: 'Such legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the Constitution, while far removed in time, we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions.' Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636."

14. *Fitzhugh* v. *City of Jackson* (1923), 132 Miss. 585, 97 So. 190, 192, 193, 194: "Conceding, however, that the municipality within its limits may exercise the police powers vested in the state, is this ordinance a valid exercise of such power? * * * The proper operation of a grocery store cannot possibly be injurious to the public health. One of the ordinary uses of property is for personal gain, and in the lawful use of this property the individual is protected by the Constitution. He must so use it as not to injure others. By using this property for the purpose of conducting a retail grocery store in a lawful manner he does not injure, in the legal sense, the property of his neighbor. * * * This ordinance is an arbitrary interference with the individual use of private property by the owner thereof. It does not come within the police power delegated to the municipality nor the police power of the state."

See also *John R. Spann* v. *City of Dallas* (1921), 111 Tex. 350, 235 S. W. 513, 19 A. L. R. 1387, 1392, 1393.

15. *People* v. *City of Chicago* (1913), 261 Ill. 16; 103 N.E. 609, 49 L.R.A. N.S. 438.

16. *Bjork* v. *Safford* (1929), 333 Ill. 355, 359; 164 N.E. 699.

In *People* v. *City of Chicago* (1913), 261 Ill. 16, 21, 103 N. E. 609, 49 L. R. A., N. S. 438, it is said: "Legislation, either by the State or by municipal corporations, which interferes with private property rights or personal liberty, cannot be sustained for purely aesthetic purposes."

Ernest Freund, *The Police Power* (Chicago 1904), p. 11: "Broadly speaking, there are therefore three spheres of activities, conditions and interests which are to be considered with reference to the police power: a conceded sphere affecting safety, order and morals, covered by an ever increasing amount of restrictive legislation; a debatable sphere, that of the proper production and distribution of wealth, in which legislation is still in an experimental stage, and an exempt sphere, that of

conditions.[17] This has been a constant attribute, for, over the years, the courts have refused to compress the police power into a limited and rigid definition. They have kept it flexible and poised to meet changing

moral, intellectual and political movements, in which our constitutions proclaim the principle of individual liberty."

17. *People* v. *City of Chicago* (1952), 413 Ill. 83, 108 N. E. 2d 16, 21: "With the growth and development of the state, the police power necessarily develops, within reasonable bounds, to meet the changing conditions. The power is not circumscribed by precedent arising out of past conditions but is elastic and capable of expansion to keep up with human progress. It extends to the great public needs, that which is sanctioned by usage or held by prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. *City of Aurora* v. *Burns*, 319 Ill. 84, 149 N. E. 784."

Herrin v. *Arnold* (1938), 183 Okla. 392, 82 Pac. 2d 977, 979, 119 A. L. R. 1471: "The inherent police power of the state has few fixed limitations; rather 'its limitations are plastic in their nature and will expand to meet the actual requirements of an advancing civilization and adjust themselves to the necessities of our multiplying complexities in moral, sanitary, economic, and political conditions.' Ex Parte Tindall, 102 Okla. 192, 229 P. 125, 130. In enacting much of modern legislation, it has often been said, the Legislature is merely making a new application of an already existing power, not exercising a new power."

Leonard v. *State* (1919), 100 Ohio St. 456, 127 N. E. 464, 465: "The dimensions of the government's police power are identical with the dimensions of the government's duty to protect and promote the public welfare. The measure of police power must square with the measure of public necessity. The public need is the polestar for the enactment, interpretation, and application of the law. If there appears in the phrasing of the law and the practical operation of the law a reasonable relation to the public need, its comfort, health, safety, and protection, then such act is constitutional, unless some express provision of the Constitution be clearly violated in the operation of the act.

"Moreover the growth of the police power must from time to time conform to the growth of our social, industrial, and commercial life. You cannot put a strait-jacket on justice any more than you can put a strait-jacket on business. Private initiative, enterprise, and public demand are constantly discovering and developing new methods and agencies, honest and dishonest, and the police power must be always available to afford apt and adequate protection to the public."

A good general statement concerning the police power is found in *People* v. *Rosehill Cemetery* (1929), 334 Ill. 555, 560, 166 N. E. 112, where the court said: "The police power is the power of the sovereign to legislate in behalf of the public health, morals or safety by general regulations reasonably adapted to the object in view without creating arbitrary discriminations between different classes of men or things. (Nichols on Eminent Domain, p. 53.) The authority of the State to enact laws reasonably necessary to promote the general welfare comprehends a wide range of judgment and discretion in determining the matters which are of sufficient general importance to be subjected to State regulation and administration. (*Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *City of Aurora* v. *Burns*, 319 Ill. 84.) With the growth and development of the State the police power necessarily develops, within reasonable bounds, to meet the changing conditions. (*Public Utilities Com.* v. *City of Quincy*, 290 Ill. 360.) The power is not circumscribed by precedents arising out of past conditions, but is elastic and capable of expansion in order to keep pace with human progress. (*City of Aurora* v. *Burns*, *supra.*) It is not a fixed quantity, but it is the expression of social, economic and political conditions. As long as these conditions vary the police power must continue to be elastic—*i. e.*, capable of development. The police power aims directly to secure and promote the public welfare, and it does so by restraint and compulsion. (Freund on Police Power, sec. 3.) Under that power, rights of property are impaired neither because they become useful or necessary to the public nor because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests. Freund on Police Power, sec. 511."

conditions which from generation to generation require new regulation or different application of an old principle to new facts.[18]

Primarily this has been done by the courts. In passing upon the constitutionality of legislative acts, they have shifted the line between the permissible and the forbidden, to accommodate prevailing social, political and economic ideas,[19] by having recourse to the convenient

18. *Jacobson* v. *Massachusetts* (1905), 197 U. S. 11; *Sligh* v. *Kirkwood* (1915), 237 U. S. 52; *Cusack Co.* v. *City of Chicago* (1917), 242 U. S. 526; Thomas R. Powell, "The Supreme Court and the State Police Power, 1922–1930," 17 Va. Law Rev. 529: "Whatever the theory, the fact is that the Supreme Court of the United States can pass on the resonableness of the police measures of every state and city in the land. This is not to say that the judicial test of constitutional unreasonableness coincides with what the judges would not vote for if they were acting formally as legislators. They undoubtedly sustain legislation that they think silly or pernicious. Yet the point at which they call a halt as the limit of constitutional power is determined by them and not by the Constitution. Unreasonableness is too unreasonable when it becomes arbitrary or oppressive. Such are the terms. Like other terms they do not mark with precision their content. They can be known only by their fruits in the cases. The cases deal with situations so varied that their results can seldom be profitably expressed in generalizations. Discard the particulars, and the proposition for which a case may be thought to stand is one that affords little guide for judgment. We must go back to the particulars to find its meaning in the case."

19. In *People ex rel. Brixton Operating Corp.* v. *La Fetra* (1920), 185 N. Y. S. 632, 113 Misc. Rep. 527, 531, 532, affirmed 186 N. Y. S. 58, 194 App. Div. 523, which is affirmed 130 N. E. 601, 230 N. Y. 429, 16 A. L. R. 152, the court said: "* * * the meaning of the words police power and the meaning of the word property are not and cannot be fixed and unchanging. The two concepts are more or less in conflict, and as one is enlarged the other is sometimes correspondingly diminished. The one represents the right of the community to protect itself. The Roman maxim was *Salus populi suprema lex*. The other represents the right of the individual to dominion over such things as are permitted by the state to be the subjects of ownership. But the individual right of dominion extends only so far as the welfare of the community permits to extend, or probably it would be more accurate to say so far as the preponderant public sentiment of the time deems that the welfare of the community can safely permit it to extend. As John Stuart Mill expresses it, 'The idea of property is not some one thing, identical throughout history and incapable of alteration, but is variable like all creations of the human mind. At any given time it is a brief expression denoting the rights over things conferred by the law or custom of some given society at that time; but neither on this point nor on any other has the law and custom of a given time and place a claim to be stereotyped forever.' 31 Fortnightly Review, 513; Chapters on Socialism, 527."

Pettis v. *Alpha Alpha Chapter of Phi Beta Pi* (1927), 115 Neb. 525, 213 N. W. 835, 838: " '* * as a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions. What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power. * * * In its inception the police power was closely concerned with the preservation of the public peace, safety, morals, and health without specific regard for "the general welfare." The increasing complexity of our civilization and institutions later gave rise to cases wherein the promotion of the public welfare was held by the courts to be a legitimate object for the exercise of the police power. As our civic life has developed, so has the definition of "public welfare," until it has been held to embrace regulations "to promote the economic welfare, public convenience and general prosperity of the community." ' *Miller* v. *Board of Public Works*, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479."

and fluid concept of "public welfare" or "public good" and "general prosperity."[20].

As Mr. Justice Cardozo wrote:

> "Property, like liberty, though immune under the Constitution from destruction, is not immune from regulation essential for the

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20. In *Bacon* v. *Walker* (1907), 204 U. S. 311, 317, 318, the United States Supreme Court said: "That [police] power of the State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. * * * That power is not confined * * to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people."

See also *Walls* v. *Midland Carbon Co.* (1920), 254 U. S. 300, 314, citing the above case.

C. B. & Q. Railway v. *Drainage Comm'rs* (1906), 200 U. S. 561, 592, 26 S. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175: "* * the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety."

Chicago & Alton Railroad Co. v. *Tranbarger* (1915), 238 U. S. 67, 77, 35 S. Ct. 678, 59 L. Ed. 1204: "And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals, or safety."

State v. *Perley* (1917), 173 N. C. 783, 92 S. E. 504, 505, affirmed in *Ferley* v. *State of North Carolina*, 39 S. Ct. 357, 249 U. S. 510, 63 L. Ed. 735: "The possession and enjoyment of all rights are subject to such reasonable conditions and regulations as may be deemed by the Legislature essential to the public welfare, and especially are they held in subordination to the exercise of the police power which extends and relates to the preservation of the peace, good order, safety, health, morals, convenience, and comfort of the people. It is not confined to the suppression of what is offensive, disorderly, or unsanitary, but embraces those rules and regulations designed to promote the public good and general prosperity of the community, provided that the legislation of whatever kind has a real or substantial relation to those objects, and is not a palpable invasion of individual rights secured by the fundamental law. In its broadest sense, as sometimes defined, it includes nearly all legislation and almost every function of civil government."

City of Portland v. *Public Service Commission* (1918), 89 Oreg. 325, 173 Pac. 1178, 1180: "But, as held in *Woodburn* v. *Public Service Commission*, 82 Or. 114, 161 Pac. 391, L. R. A. 1917C, 98, Ann. Cas. 1917E, 996, the police power is not restricted to such narrow limits. As stated in section 1, article 1, of our state Constitution, governments are instituted for the peace, safety, and happiness of people. In other words, the general welfare of the people is within the police power of the government and one of the peculiar objects of its care."

State v. *J. M. Seney Co.* (1919), 134 Md. 437, 107 Atl. 189, 193: "In the process of the application of that power to new and varied conditions affecting the public welfare, it has been gradually extended beyond its original scope. It was formerly concerned with the protection of the public health, morals, and safety. By our own recent decisions it is now recognized as extending to the promotion of the general welfare."

common good. What that regulation shall be, every generation must work out for itself."[21]

Recent generations have had to work out those regulations in the light of the controlling fact that they are preponderantly city dwellers. As was well stated by a New Jersey court:

> "While the police power is not variable in either quality or quantity, it is coincident with the requirements of the general public welfare arising from changing conditions—social, economic, or otherwise. The complexities of modern community life necessarily impose a greater demand upon this reserve power for such reasonable supervision and regulation as may be essential for the common good and welfare. *State Board of Milk Control* v. *Newark Milk Co., supra.* They have placed reciprocal restrictions upon individual rights; and the authority may be directed to the reasonable accommodation of relative rights and duties dictated by the common interest. To borrow the language of Mr. Justice Holmes, 'It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.' *Noble State Bank* v. *Haskell* [(1911), 219 U. S. 104, 31 S. Ct. 186, 188 L. Ed. 112, 32 L. R. A., N. S., 1062, Ann. Cas. 1912A, 487]. Again citing the same eminent authority, 'circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern.' *Block* v. *Hirsh* [(1921), 256 U. S. 135, 41 S. Ct. 458, 459, 65 L. Ed. 865, 16 A. L. R. 165]."[22]

Today's problem

The changes which have been taking place in the factual background to which the concept of police power must be applied were ably summarized a quarter of a century ago. What was said then is even more true today:

> "This is the age of cities. In 1920, 51.4 per cent of our population was urban, and the influx of people into our cities has increased in the past six years. Perhaps the next generation will see cities of twelve or fifteen million inhabitants, and no one can tell what limits will be reached. The rapid development of American cities has

21. *The Nature of the Judicial Process*, p. 87, citing *Green* v. *Frazier* (1920), 253 U. S. 233.

22. *Mansfield & Swett Inc.* v. *Town of West Orange* (1938), 120 N. J. L. 145, 198 Atl. 225, 232.

caused much concern to those interested in the welfare of the American people. The city planning and zoning movement, which has had a phenomenal growth in the last decade, is the result of apprehension for the future of our congested and badly organized municipalities. A great number of problems have been created by this concentration of population. Sewage disposal, traffic congestion, housing conditions, race segregation, public recreation, and the like have become absorbing topics. Municipal and state governments have engaged in paternalistic enterprises which would have been regarded as socialistic a generation ago. Clinics, housing bureaus, sanitary departments, museums, libraries, municipal universities and trade schools, employment agencies, community centers, civic operas, and so forth are but a few of the recent governmental activities. Life has ceased to be home life but has become apartment life. Meals are now eaten at cafeterias, and we sleep on beds that disappear behind the door to furnish more of the room that has become so precious. There was a time when a man's affairs were his own; his house was his own; his liberty and his property were the things most dear to him. His yard and his house were spacious and isolated. If he wanted water, he dug a well or went to the town pump; his lights were furnished by a kerosene lamp that any one might own. In the city, today, we are forced into co-operation with our neighbors whether we desire it or not. We cannot dig our well in the city; the water would become impure. We cannot throw the dish water out of the window; a neighbor's complaint would result. We must own small parts of a water system, a sewer system, and a light system. We may have our home in a co-operative apartment house. We live among people, and this association with people determines whether our lives are livable or not.

"The law has taken cognizance of the changing conditions in city life. A great deal of legislation has been concerned with the public health, safety, and morals. The sense of smell is protected, as well as our sense of hearing. And everywhere we find laws passed under the police power of the state which are designed to promote the comfort and general welfare of the citizens. * * *"[23]

23. Newman F. Baker, *Legal Aspects of Zoning*, pp. 1, 2.

CHAPTER THREE

LEGISLATION RESULTING FROM URBAN PRESSURES

The common denominator of the common law

The influence of the metropolis on the concepts, rules and institutions affecting property primarily manifests itself through the enactment of legislation. The Congress, General Assemblies of the States and multitudes of lesser legislative bodies all are responsive to the problems of their constituents, most of whom now live in cities.

Back of legislation, enacted to meet current pressures, lies a great body of nonstatutory law which has accumulated through the accretions of generations of nonurban people whose customs and ideas still have a positive effect upon the law as it affects the whole economy. Throughout the country, except in a few areas which have Spanish or French background, the common law of England was adopted and still exists as the basis of existing State jurisprudence.[1] It was the everyday law of an agrarian society. It was a system of elementary rules and general judicial declarations of principles, which continually expanded with the progress of society, adapting themselves to the gradual changes of trade, commerce, arts, inventions and the exigencies and usages of the country.[2] That development continues unabated.

Many states by statute have adopted the fourth year of the reign of James the First as the date as of which the common law of England was transplanted into their basic law. That year covered the period beginning March 24, 1606, and ending March 23, 1607,[3] and was the period during which the first territorial government was established in America.[4] The original statute fixing that date was passed by the general convention of the colony of Virginia in May, 1776.[5] From Virginia it spread through most of the country as territories and states adopted the legal background of their ancestors. However, not all of the states have taken the same date as the start of their individual jurisprudence.

1. *Penny* v. *Little* (1841), 4 Ill. 301.

2. "The common law, I need not remind you, had a later origin. Nurtured by our parent profession in England, it spread with the mother tongue to the United States, British Canada, Australia, India and New Zealand. Little aided by legislation, it flourished as a consensus of experienced judicial opinion and made its way because of its reasonableness and workability in settling the ever-present conflicts in society." Address by Hon. Robert H. Jackson, Associate Justice, Supreme Court of the United States, Chicago, November 2, 1953. See also *Kreitz* v. *Behrensmeyer* (1894), 149 Ill. 496, 502; 36 N. E. 983.

3. Ill. Rev. Stat., 1951, Chap. 28, § 1; Ind. Ann. Stat. (Burns 1933), §§ 1-101.

4. *Penny* v. *Little* (1841), 4 Ill. 301.

5. 9 Hen. St. 127; *Bulpit* v. *Matthews* (1893), 145 Ill. 345, 34 N. E. 525, 22 L. R. A. 55.

New York, by constitutional provision, takes as its legal background "such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, and the resolutions of the congress of said colony, and of the convention of the State of New York in force on the twentieth day of April, one thousand seven hundred seventy-seven, which have not since expired, or been repealed or altered."[6]

Florida patriotically fixed July 4, 1776, as the date of which "the common and statute laws of England which are of a general and not a local nature" were accepted as the foundation of State law.[7]

But all of the common law states have used some date between the fourth year of the reign of James the First and the signing of the Declaration of Independence as the time of their adoption of the common law. As of the latter date there was no urban population worthy of the term as it is used today. Early American colonial society, to which the common law was transplanted and adapted, essentially was an agrarian society.[8] The body of the law as it then had developed to meet the needs of a small, predominantly rural, society seems to furnish a suitable background as against which to view the major influences which are attributable to the circumstance that since then people have come largely to live under urban conditions.

Growth of urban areas, 1790-1950

The first decennial census of the United States was made in 1790, a date not too remote from colonial days to indicate the population situation of those times. Exact figures and refinements of definitions and methods shown by census reports are not important to this inquiry. In round figures the essential facts are that in 1790, out of a total population of almost four million persons, only two hundred thousand lived in urban areas,[9] which means that in 1790, 95 out or every 100 persons were living in rural territory and only 5 out of every 100 were living in urban territory. In contrast to this, in 1950, more than 96 million persons, out of a total population of 150 millions, were living in

6. N. Y. Const. (1938), Art. I, § 14.

7. Fla. Stat. Ann., § 2.01; 1 *American Law of Property* 56.

8. Lewis M. Simes, "Historical Background of the Law of Property," 1 *American Law of Property*, Part 1, Chap. III.

9. *1950 Census of Population*, Vol. I, p. 1-17, Table 15. The precise figures there shown are: total population 3,929,214; consisting of urban 201,655, and rural 3,727,559.

urban areas.[10] Percentagewise, 64 out or every hundred of the total population now live in cities, leaving only 36 out of every hundred of the people living in rural areas. Thus, in the 160-year period covered by the statistics, almost two-thirds of the inhabitants of the country have come to reside in urban areas.[11]

The 1950 census classifies 168 areas in the continental United States as urban areas. They contain over 200,000 square miles of land. While this is only 7.0% of the total land area, it is occupied by considerably more than half of the total population. The same census reports that in 1950 there were 14 standard metropolitan areas with a population of a million or more persons, the largest of course being the New York-Northeastern New Jersey Standard Metropolitan Area, with a population of slightly less than 13 million persons.[12]

Growth of statutory law and other legislative enactments during comparable period

Paralleling urban growth, there has been enacted a tremendous amount of legislation. Some of it illustrates the effect of the metropolis upon the property rights and interests of the people who have herded together in great numbers in the cities of the nation. In earlier years, under constitutional theories which prevailed from the formation of the country until a score of years ago, such legislation was chiefly the product of State action. More recently, under constitutional theories of much broader and more flexible patterns, there has been added a vast number of Federal statutes which have invaded areas theretofore thought to be sacred to the states. Always there has been an even greater and overwhelming quantity of local laws. These have been passed by thousands of lesser legislative bodies, which owe their existence to the irrepressible desire of groups who live together to be self governing in local matters even though they now have come to depend upon a great central government with vast taxing powers for "security" and "welfare" and protection from economic and social ills.

And as urban centers continue to multiply and grow larger and their problems to become more complex, the volume of legislative enactments, Federal, State and local, continues to increase. The Lord High

10. *Id.*, p. xvii.

11. *Id.*, p. xvii. The precise figures shown are: total population of continental United States 150,697,361; under the urban-rural definition used in the 1950 census, urban 96,467,686, rural 54,229,675. Percentage of urban population 64.0.

12. *Id.*, Vol. I, p. xxxiii.

Chancellor of Great Britian recently thus expressed the generally accepted explanation which underlies this continuing growth:

> "The truth of the matter lies in this that the greater the complexity of modern life, the greater the need of regulation."[13]

The pattern of statutory law

The types of State statutes which have been passed in the several states, and which reflect influences of the metropolis, form a common pattern. Analysis of their subject matter discloses that they are of two general types. One is the creation of and grant of power to lesser and local municipal corporations, such as Cities, Villages, Towns, Housing Authorities, Redevelopment Corporations, Park Districts, School Authorities, Planning Boards, and similar bodies. The other is the establishment of general rules of law and overriding limitations, primarily resulting from exercise of some phase of the police power, or relating to the creation and conveyance of rights of property.

An analysis of the statutory enactments of the populous states of the country indicates that the more important kinds of State legislation which are germane to this study fall into the following somewhat over-simplified pattern:

13. Address by Lord Simonds, Lord High Chancellor of Great Britain at the Annual Meeting of the American Bar Association, Boston, Mass., August 27, 1953.

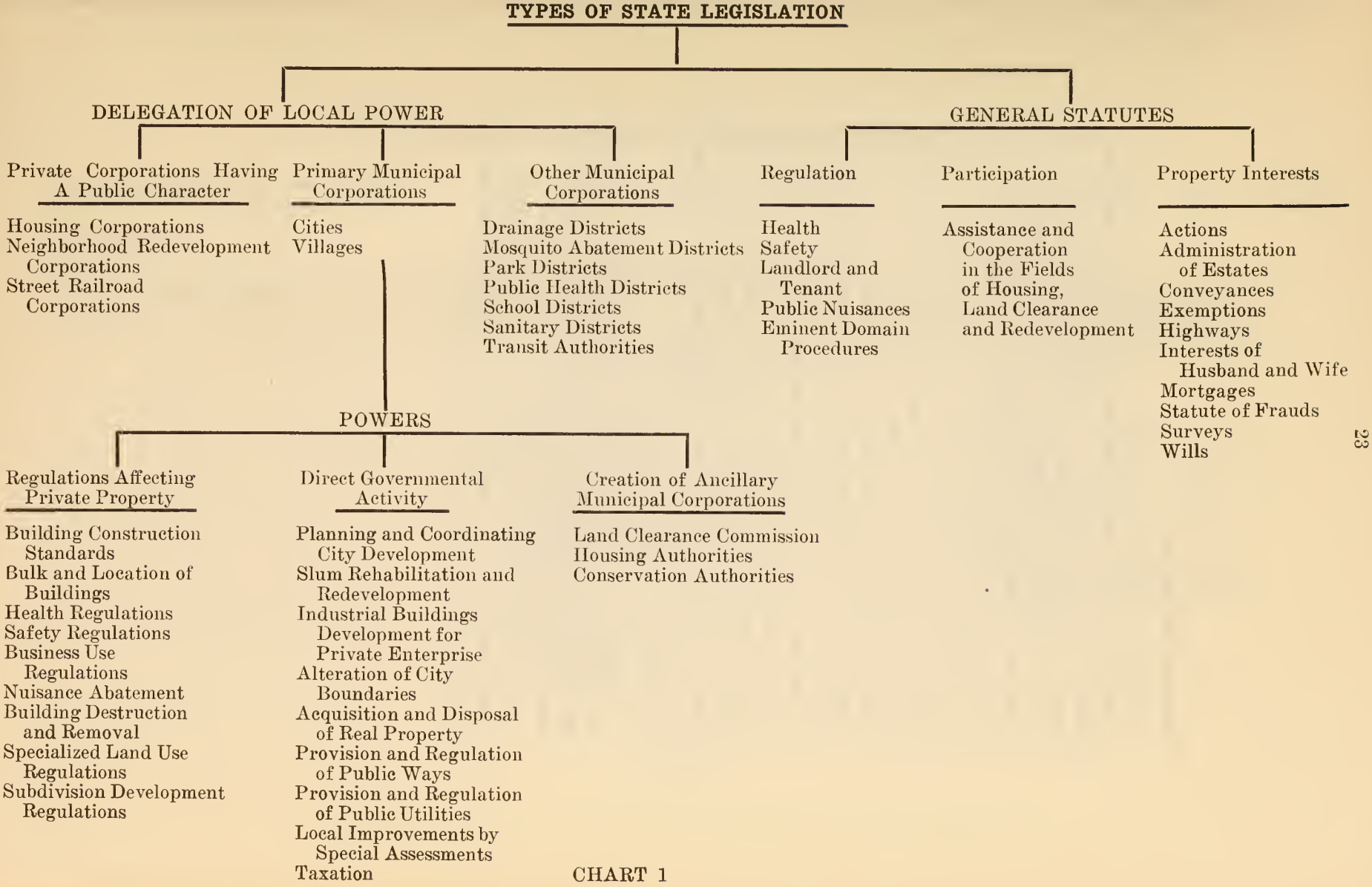

TYPES OF STATE LEGISLATION
DELEGATION OF LOCAL POWER
GENERAL STATUTES
Private Corporations Having A Public Character
Primary Municipal Corporations
Other Municipal Corporations
Regulation
Participation
Property Interests
Housing Corporations
Neighborhood Redevelopment Corporations
Street Railroad Corporations
Cities
Villages
Drainage Districts
Mosquito Abatement Districts
Park Districts
Public Health Districts
School Districts
Sanitary Districts
Transit Authorities
Health
Safety
Landlord and Tenant
Public Nuisances
Eminent Domain Procedures
Assistance and Cooperation in the Fields of Housing, Land Clearance and Redevelopment
Actions
Administration of Estates
Conveyances
Exemptions
Highways
Interests of Husband and Wife
Mortgages
Statute of Frauds
Surveys
Wills
POWERS
Regulations Affecting Private Property
Direct Governmental Activity
Creation of Ancillary Municipal Corporations
Building Construction Standards
Bulk and Location of Buildings
Health Regulations
Safety Regulations
Business Use Regulations
Nuisance Abatement
Building Destruction and Removal
Specialized Land Use Regulations
Subdivision Development Regulations
Planning and Coordinating City Development
Slum Rehabilitation and Redevelopment
Industrial Buildings Development for Private Enterprise
Alteration of City Boundaries
Acquisition and Disposal of Real Property
Provision and Regulation of Public Ways
Provision and Regulation of Public Utilities
Local Improvements by Special Assessments
Taxation
Land Clearance Commission
Housing Authorities
Conservation Authorities

CHART 1

Municipal ordinances

The states generally have delegated to their cities and other urban municipalities a great variety of local powers. In turn, cities and villages, pursuant to the powers granted, have legislated upon innumerable aspects of property law. Building codes, sanitary requirements, fire prevention procedures, requirements as to streets and open spaces for public use, mechanics for obtaining public improvements at the expense of the realty favorably affected, paving, drainage, water supply, sewers, and a multitude of other requirements, which become important when many people live in a limited area, all are reflected in such ordinances. Municipal legislation in particular has the effect of subordinating the right of an individual to do as he pleases to the will of the community in which he elects to live. City ordinances like state statutes always seem to multiply. As the pressures generated by the ever-increasing numbers of persons seeking to live in the same limited area increase, so do the laws and ordinances. The net effect is that one who acquires ownership of a lot in a city may be compelled against his will and judgment to install or at least to pay the cost of installing sidewalks, water and sewer connections, and pavement. And when he seeks to build a habitation, he is compelled to submit his plans and specifications to city officials, to secure a permit to build on his own land, and to conform to endless city requirements in the structure he builds.

For their validity municipal ordinances depend upon an appropriate grant of power by the State to the municipality, a suitable exercise of that power, and freedom from such invasion of individual rights as may cause judicial frustration of the attempt.

An analysis of the city ordinances of New York, Chicago and Los Angeles shows that the areas of municipal legislative controls are generally similar. They fall into the following pattern:

NEW YORK CITY ORDINANCES DIRECTLY AFFECTING CITY REALTY

CLASSIFICATION OF BUILDINGS

By Occupancy

By Type of Construction

CONSTRUCTION REGULATIONS

Means of Egress
Materials, Loads and Stresses
Workmanship
Excavations
Foundations
Masonry Construction
Reinforced Concrete Construction
Iron and Steel Construction
Wood Construction
Glass Veneer
Fire Resistive Materials
Heating Appliances, Combustion and Chimneys
Elevators
Plumbing and Gas Piping
Sprinkler Systems
Standpipe Systems
Boilers
Signs
Ventilation
Precautions During Building Operations

MISCELLANEOUS REGULATIONS

Restrictions as to Location
Fire Limits
Restrictions as to Height and Area
Restrictions on Projections and Construction Beyond the Building Line and Within the Curb Line
Rent Control
Nuisances
Repairs of Buildings
Drainage
Paving of Yards and Cellars
No Discrimination or Segregation in City Assisted Housing
City Planning Commission
Zoning
Federal and Post-War Public Works and Slum Clearance Projects

CHART 2

CHICAGO ORDINANCES DIRECTLY AFFECTING CITY REALTY

CLASSIFICATION OF BUILDINGS for Regulatory Purposes

By Occupancy

By Construction Types

CONSTRUCTION REGULATIONS

Materials, Methods and Tests
Building Standards and Tests
Safeguards During Construction
Foundations
Chimneys, Flues and Vents
Exit Requirements
Plumbing Provisions
General Standards of Electrical Installation
Electrical Equipment for Specific Uses
Light, Ventilation and Sanitation
Mechanical Refrigeration
Elevators, Dumbwaiters, Escalators and Mechanical Amusement Devices
Minimum Design Loads
Fire Protection
Fire Resistive Materials and Construction
Fire Extinguishing Apparatus
Standard Sprinkler Systems
Standard Inside Standpipe Systems
Water Supply and Distribution Systems
Safety Requirements (Railings, etc.)
Heating Provisions
Steam Boilers and Unfired Pressure Vessels
Warm Air Heating Plants
Wood Construction
Masonry Construction
Reinforced Concrete Construction
Steel and Metal Construction

OTHER CONTROLS

Zoning
Rent Control
Nuisances
Fire Limits
Height and Area Limitations
Location Limitations
Frontage Consents
Building Permits
Building Certificates
Use of Public Property

CHART 3

ORDINANCES OF THE CITY OF LOS ANGELES AFFECTING REAL PROPERTY

HEALTH AND SAFETY

Plumbing
Sewers
Ventilation
Boilers
Elevators and Dumb-Waiters
Garbage and Refuse Disposal
Watercourses and Supply

BUILDING CONSTRUCTION

Occupancy Requirements
Fire District Regulations
Types of Construction
Loads and General Design
Masonry
Wood
Concrete
Steel and Iron
Excavation, Foundations and Retaining Walls
Veneered Walls
Wood Preservatives
Roof Construction and Covering
Exits
Roof Structures
Chimneys and Heating Appliances
Fire Resistive Materials
Safety Provisions
Projections and Buildings
Lathing and Plastering
Wood Frame Dwellings and Accessory Buildings
Signs, Signboards and Sign Devices
Electrical Code
Plumbing and Drainage

OTHER REGULATIONS

Zoning
Building Lines
Yard Regulations
Residence Districts
Public Camp, Cemetery, Rabbit or Poultry Slaughter House and Undertaking Districts
Repair, Vacation, Demolition of Dangerous Buildings

CHART 4

The result of the judicial function

The history, background and reasons which have impelled changes in the rules, concepts and institutions relating to property frequently are found in the reported decisions of the courts of review of the nation. In their opinions courts are apt to reveal even more clearly than do legislative statements of policy the forces which they believe justify their actions.[14] Judge-made laws are one of the potent factors in the legal evolutionary process.[15]

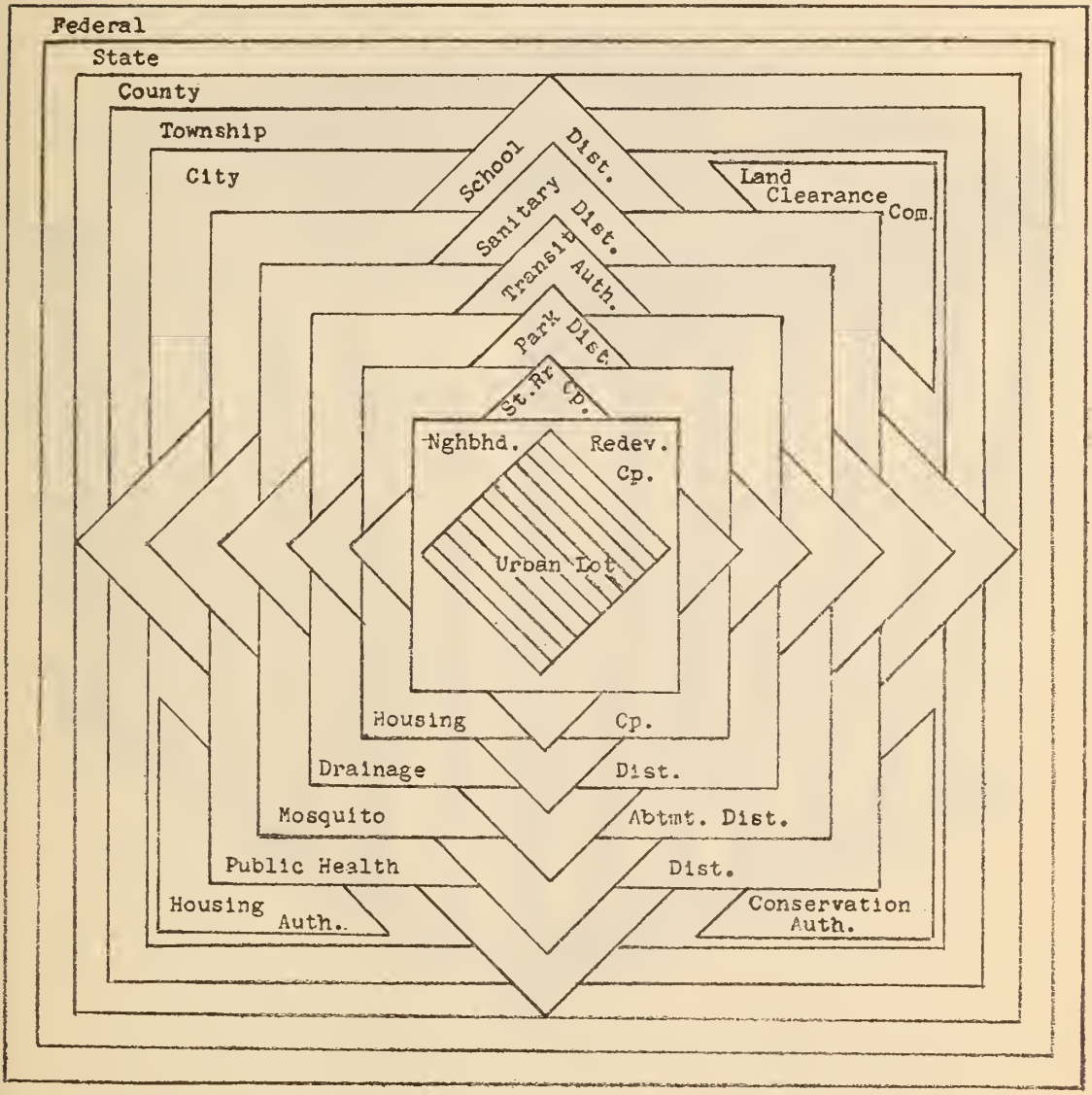
The volume of legislative control

Any given piece of city realty is subject to multiple controls and regulations. These are found in statutes, ordinances, rules and regulations of many overlapping public bodies within whose jurisdiction it falls. As metropolitan areas grow in size and complexity the number of such public bodies increases to meet the specific problems which result, and all public bodies have a tendency to meet specific problems by exerting their legislative powers and enacting laws of broad enough scope to encompass the known problems and all related problems which the law makers can foresee. The following chart indicates a number of the sources from which regulatory measures emanate and the kinds of public bodies which may have their own peculiar type of jurisdiction over a single piece of land.

14. See footnotes to Chapters IV and VI, *post*.

15. The Judge as a Legislator, p. 98, Lecture III, *The Nature of the Judical Process*, by Benjamin N. Cardozo (1921), Yale University Press. See also *An Introduction to the Philosophy of Law*, by Roscoe Pound, (1921), p. 35, Yale University Press.

THE MAZE OF POLITICAL AND CORPORATE ENTITIES HAVING POWER TO AFFECT AN URBAN LOT.



For legislation see:
Chart No. 7 (Federal).
Chart No. 1 (State).
Charts Nos. 2, 3, 4 (City).

CHART 5

The kinds of burdens which may be imposed by public bodies

These bodies may impose many, and sometimes overlapping, restrictions and limitations upon a given piece of realty which falls within their jurisdiction. Many of them have powers of eminent domain. All of the public bodies derive their sustenance from taxes. Some like cities, villages and towns, through their powers to zone and regulate the details of building, have many more direct influences on realty within their jurisdiction than do others. Some have very limited powers, others much broader powers. But all are illustrations of what happens when land becomes part of a metropolitan area. Typical examples of the burdens which may be imposed by them are shown in the following chart.

BURDENS IMPOSED BY PUBLIC BODIES

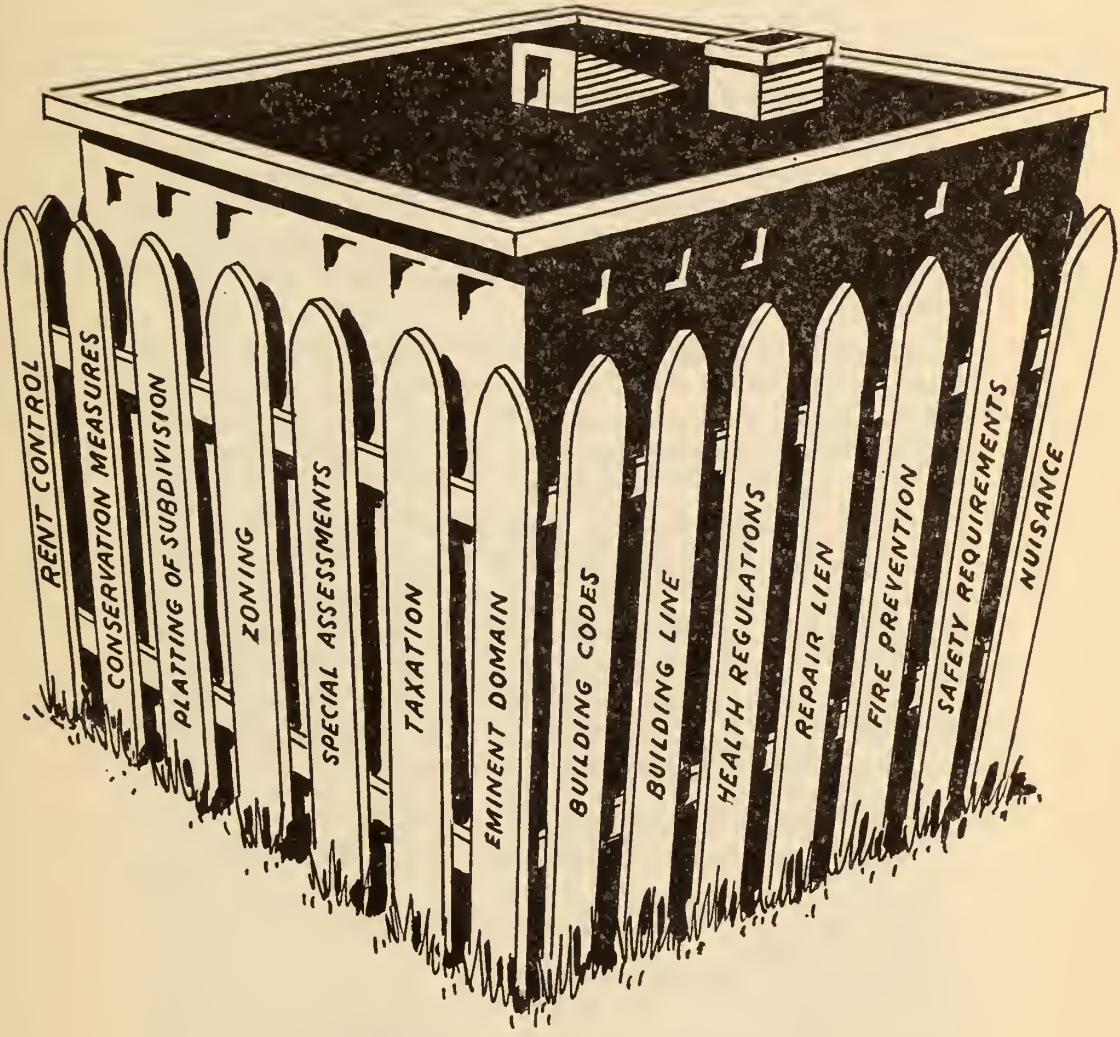


CHART 6

CHAPTER FOUR

ZONING

Zoning an aspect of the police power

Possibly the most spectacular and generally recognized present-day influence of the metropolis upon the concepts, rules and institutions relating to property is found in that aspect of the police power known as zoning. Within the last generation practically every sizable city and village has enacted zoning ordinances applicable to the area within its jurisdiction.

Comprehensive zoning of a whole city is intended to control the destiny of every parcel of land within its jurisdiction. By this device the metropolis seeks to limit by districts the character of buildings which may be erected, to prescribe the areas of land which may be built upon, to require observance of height limits and setbacks and building lines, and all of the minutiae found in modern zoning ordinances.[1] This

1. Zoning ordinances cover much detail and are of very broad scope. Due to the fact that many cities enacted them at about the same time, they conform to a general pattern. Usually they consist of two parts. One part consists of detailed use and volume district maps, which depict the entire city, block by block, and by suitable symbols indicate the use districts and the volume districts which apply to each tract. The other part consists of text material, contains definitions and specifies permitted and prohibited actions. Because zoning is such a distinctive result of metropolitan influence there is here set out the substance of such an ordinance. The Chicago Zoning Ordinance has been selected as typical of those which are applicable to large cities. In its textual portion, it provides that:

Uses permitted in "Family Residence districts" are:
Family residence
Convent, monastery, rectory, parish house, or church
Grade, high school or Sabbath school
Professional persons may use their residences for consultation or emergency treatment.

Uses permitted in "Duplex Residence districts" are:
Same as in a Family Residence district, plus
Duplex Residence.

Uses permitted in "Group House districts" are:
Same as in a Family Residence district, plus
Group houses

Uses permitted in "Apartment House districts" are:
Same as in a Family Residence, Duplex Residence or
Group House districts, plus
Apartment house
Boarding, or lodging house, hotel, hospital, home for dependents or nursing home.
Boarding school, vocational school, college or university, if nonprofit
Club, fraternity or sorority house, if nonprofit

exercise of social judgment and compulsion has slight regard for the wishes of an individual landowner. It is a clear exercise of the power of a large group, intent on serving what is conceived to be the general

Public art gallery, library or museum
Professional person's sign
Hotel restaurant

Uses permitted in "Specialty Shop districts" are:

Same as in an Apartment House district, excluding family and duplex residences and group and apartment houses of only two apartments.

Any of the following uses are permitted on the first story of a building:

Barber shop, beauty parlor, chiropody, massage or similar personal service shop, custom dressmaking, millinery, tailoring, shoe repairing or similar trade
Office
Pharmacy
Receiving room for dry or steam cleaning to be done elsewhere
Restaurant, if no entertainment
Retail store, except liquor, automobiles, tires and animals
No preparation of food for sale elsewhere and no slaughtering
Signs.

Uses permitted in "Business districts" are:

Same as in a Specialty Shop district but with no limitation as to first floor and including
Automobile sales and repairs including commercial vehicles under two tons
Bank
Billiard hall
Boarding, grade or high school, college or university, if nonprofit
Carpentry, plumbing, heating and roofing supply and workshop
Hand laundry
Hand work shop
Music school, juvenile dancing school
Public garage for cars and commercial vehicles under two tons
Tavern or retail sale of liquors
Tire sales and repairs
Undertaking establishment
Wholesale sales office or sample room
Billboards and signs
Filling station, including enclosed greasing and washing facilities.

Uses permitted in "Commercial districts" are:

Same as in a Business district, plus
Armory or arsenal used only as a repository
Bowling alley and places of amusement
Dog kennel, pet shop or animal hospital
Greenhouse
Indoor auditorium type theater
Laboratory
Laundry
Livery stable
Parcel delivery station
Radio broadcasting station
Retail sales agency for trucks, tractors, busses and truck trailers, including service department
Dancing, horseback riding or vocational school

If completely enclosed and not offensive:

Assembling and storing of electrical appliances, radios and phonographs
Dry cleaning
Manufacturing, processing or storing of specified products

welfare, over what in a simpler social setting would have been the cherished and protected right of the individual to use his land to suit his own convenience, provided he did not affirmatively harm his neighbors. This process has required the application of old principles to new facts. Truly it has been a process of shifting the line between the permissible and the forbidden into what had been a field of free action.[2]

Printing, binding, storing, publishing and issuing of reading matter
Storage of household goods, flammable liquids, fats or oils
Automobile sales lot for cars and commercial vehicles under two tons
Motion picture producing
Wholesale produce market.

Uses permitted in "Manufacturing districts" are:

Same as in a Commercial district, except residences or apartments; churches, schools, public auditoriums, open-air assembly units, any commercial amusement place

Where all operations are within lot lines:

Beverage, feed, food and food product bottling, canning, packing and distributing
Cleaning, dyeing and bleaching of yarns, textile and felt products
Crematory
Feed manufacturing
Laundry
Livery stable
Lumber yard, wood yard and place for the storage in bulk of barrels, boxes, mill work, building materials, paving materials, machinery, equipment, vehicles, junk, rags, cotton, paper, scrap iron and similar materials and products
Hotel or lodging house
Barber shop, beauty parlor, massage or similar personal service shop
Office
Pharmacy
Restaurant
Retail store, club, union headquarters, trade association rooms, or recreation centers for truckers, employers and employees, taverns or retail liquor stores
Motor freight terminal, railroad and water freight terminal; warehouse
Truck garage, parking lot, truck lot, truck sales, motor truck service and repair shop
Parcel delivery station; local cartage service and garage; public garage
Bank
Filling station
Signs other than billboards.

Regulations found in "Volume districts" include:

Ground area of buildings
Height of buildings
Volume of buildings
Building lines.

2. *City of Aurora* v. *Burns* (1925), 319 Ill. 84, 93, 94, 149 N. E. 784: "The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the State, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly. With the growth and development of the State the police power necessarily develops, within reasonable bounds, to meet the changing conditions. (*Public Utilities Com.* v. *City of Quincy, supra.*) The power is not circumscribed by precedents arising out of past conditions, but is elastic and capable of expansion in order to keep pace with human

Its background

Zoning has been practiced for many years in the European cities. There is some disagreement as to when it was first put in use. One author fixes the date as 1810, under a decree of Bonaparte, Napoleon I. Another fixes the date as 1853, in Paris.[3] In England, the first official zoning law was the Town Planning Act passed in 1909. This was an act which combined zoning and planning.[4]

There is lack of agreement as to the beginning of zoning in the United States. Whatever the exact historical fact may be, it is clear that as settlements grew into hamlets, then into villages, and finally into cities, the problems of congestion and safety became greater and more pronounced, and the problems of use and development of land in such a way as to benefit society rather than the individual owner became more acute.[5]

In this country, the attempt to solve the problems of use of land, intensity of its development, character of buildings, and the many refinements which modern city zoning ordinances now contain, are pro-

progress. Mr. Justice Holmes well defined the nature and extent of the power in *Noble State Bank* v. *Haskell, supra:* 'It may be said in a general way that the police power extends to all the great public needs. (*Camfield* v. *United States*, 167 U. S. 518.) It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.' "

Goldman v. *Crowther, City Inspector of Buildings, et al.* (1925), 147 Md. 282, 128 Atl. 50, 57, 38 A. L. R. 1455: "That the right to hold, enjoy, and use property is not absolute, but subject to the police power of the state, is axiomatic (6 R. C. L. 194), and that that power may be affected by changing conditions is inevitable and unquestionable, for a use which at one time may be inoffensive and harmless may at another affect the security or the welfare of others with equal rights, and one of the sources of the police power is the maxim, 'Sic utere tuo ut alienum non laedas.' So property in a populous urban community may be properly subjected to restrictions which would be unreasonable and arbitrary in a thinly settled rural community, so long as the restrictions bear some definite relation to the protection of the public health, morals, safety, or comfort."

3. "The most searching review of the early history and progress of zoning, is credited to a German authority—Baumeister, who published his treatise and book in 1876. In his writing, he records 'use' zoning as having been founded by a decree of Bonaparte—Napoleon I—pronounced in 1810. It has been stated that to a considerable extent, this order was meant to do no more than protect districts from the invasion of injurious uses. In its other provisions, it went beyond that simple aim and really formed the first recorded official limitation upon uses in various districts." James Metzenbaum, *The Law of Zoning* (New York 1930), p. 14.

Compare E. C. Yokley, *Zoning Law and Practices* (Charlottesville, Virginia, 1948), p. 2.

4. James Metzenbaum, *op. cit.*, p. 15.

5. James Metzenbaum, *op. cit.*, p. 1.

ducts of the twentieth century, the peak period to date of the metropolis.[6] Los Angeles apparently first experimented in this field in 1909,[7] and New York in 1916.[8] Following these starts, many comprehensive zoning ordinances were adopted in the next score of years in cities throughout the country.

Time lag between problem and solution

It is doubtful if there is a more clear illustration than is furnished by zoning of the time lag between the creation of a metropolitan need and the finding of a workable legal answer to that need. Throughout the last two centuries, cities, villages and metropolitan areas have been growing at an obvious and rapid, but uneven, rate, blossoming and decaying, taking in new territory and abandoning old to the ravages of time. And only during the last quarter of that time existing legal principles have been shaped to the end of slowing the process and making it at least more orderly.

Legal evolution

In tracing the influence of the metropolis on the concepts, rules and institutions relating to property, the legal evolution of this important segment cannot be passed by.

—The concepts involved

The fundamental legal concepts involved in zoning are readily stated. Legislative power which has not been granted to the Federal Government under the Federal Constitution is vested in the people of the States.

6. *Women's Kansas City St. Andrew Soc.* v. *Kansas City, Mo.* (1932), 58 Fed. 2d 593, 598, 599: "Zoning as distinguished from regulation or proscription of a certain use of property is a twentieth century development, and has been productive of much litigation. Many of the subjects now dealt with by zoning ordinances were formerly matters of individual regulation under the police power of municipalities, such as control and regulation of places of public resort and amusement, the handling of explosives, the prevention of fires, the abolition of nuisances and other matters having relation to the public welfare. To meet the changing and complex conditions of urban life brought about largely by the industrial development of the country, and to separate industrial and business districts from residence districts, the zoning system has been evolved out of the laudable desire to make it possible for people to enjoy home life in peace and quietude."

7. In 1909, the business sections of Los Angeles were divided into seven industrial districts and the remaining areas into a residential district. Another ordinance divided the city into residence districts, excluding certain uses. It is interesting to note that these ordinances were adopted without any State enabling act. Edward M. Bassett, *Zoning* (New York 1936), p. 13.

8. It seems to be generally accepted that the city of New York enacted the first *Comprehensive Zoning Ordinance* in 1916. James Metzenbaum, *The Law of Zoning* (New York 1930), p. 17.

Municipal government, like the Federal Government, is a government of delegated powers and derives its powers from the State. The power of a municipal corporation to legislate must be found in a proper delegation of power by the State and must be reasonably exercised.[9] The relatively recent and dramatic judgments of the United States Supreme Court giving new and tremendously broader interpretations to the commerce and welfare clauses of the Constitution and corresponding increase in power to the Federal Government, and the theories under which these newly recognized powers of vast extent may be exercised by the Federal Government, still leave this basic principle in effect. The reservoir of State power is much diminished as compared to what it once was thought to be, but it still contains the powers not granted.

The State, being possessed of the great reservoir of legislative power, and the all important police power, may grant to its municipalities those aspects of its power which are deemed necessary and appropriate to further the welfare of people who live in municipalities. Consequently, in the field of zoning, states generally have proceeded through the process of delegating requisite power. They have adopted enabling acts, giving to their municipalities appropriate power to enact local ordinances by which the lands and buildings of the entire municipality are controlled.[10] Pursuant to the grant of such power, a great many municipalities have enacted comprehensive zoning ordinances.[11]

—The adjustment between community compulsion and individual freedom of choice

The idea that municipalities might enact ordinances under which one man living in an urban area is limited to the improvement of his vacant real estate with a single-family residence, while another may improve his land with an apartment house, or office building, or hotel, or factory, requires a nice balancing of countervailing elements. It was not accepted without opposition. There was a sharp clash between community compulsion and an individual's freedom of choice in the use of his property, which was acquired by his effort and judgment. Early zoning efforts were followed by considerable litigation. The early cases attacked the principle

9. *Western Springs* v. *Bernhagen* (1927), 326 Ill. 100.

10. Casner and Leach, "Legislation Restricting the Use of Land and Constitutional Limitations Thereon," *Cases on Property* (Rev. Temp. Ed. 1948), Chap. 1, Part VII.

11. These include hundreds of urban communities and some counties. Dr. Ernest N. Fisher, "Economic Aspects of Zoning, Blighted Areas and Rehabilitation Laws," *American Economic Review Supplement* (March 1942), Vol. XXXII, No. 1, p. 331.

of zoning. They were designed to test the fundamental propriety of such a solution of a community problem. As a result of this type of attack, many of the early zoning ordinances were held to be invalid. A typical example of the reasoning of the courts which resulted in such a conclusion is found in one of the earlier zoning cases in which the zoning ordinance of Baltimore was held to be invalid.[12] The court said:

> "We have reached the conclusion, therefore, that so much of the ordinance as attempts to regulate and restrict the use of property in Baltimore city is void: First, because it deprives property owners of rights and privileges protected by the Constitution of the state; second, because such deprivation is not justified by any consideration for the public welfare, security, health, or morals apparent in the ordinance itself; and, third, because it does not require that the restrictions shall in fact be based upon any such consideration. But in reaching this conclusion we do not hold that the use of property in Baltimore city may not be regulated or restricted where such regulation or restriction is based upon such consideration."[13]

—Euclid v. Ambler

The fundamental legal principles involved finally were settled in 1926, by the United States Supreme Court in the case of *Village of Euclid* v. *Ambler Realty Co.*[14] It was a landmark case in the field of zoning and in the area of conflict between individual property rights and social limitation of the use of realty. As an illustration of the effects of urbanization upon the legal concepts involved, it merits more than passing attention.

In 1922, the village of Euclid was a small and rapidly growing suburb of Cleveland. Between 1910 and 1920, its population had increased from less than two thousand to more than three thousand. Parenthetically, by 1950, it was over forty thousand.[15]

12. *Goldman* v. *Crowther, City Inspector of Buildings, et al.* (1925), 147 Md. 282, 128 Atl. 50, 60.
13. Id.
14. (1926), 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016.
15. The figures as shown by the 1950 Census (p. 35-9) are:

1910	1,953	1930	12,751
1920	3,363	1940	17,866
	1950	41,396	

In 1922, Euclid enacted a zoning ordinance. Its ordinance divided the village into six use districts, ranging from a highly restricted, single-family dwelling district to an almost unrestricted industrial district. The ordinance also established three height districts and four area districts.

The Ambler Realty Company owned a tract of land abutting a railroad. The area near the railroad was zoned for industrial purposes; the approximate middle strip was zoned for apartment houses and public buildings; and the strip farthest from the railroad was zoned for two-family dwellings.

The Realty Company claimed that it held its land for industrial development and that as such it was worth $10,000 an acre. But it alleged that under the restriction to residential use the land would be worth only $2,500 an acre. It sought an injunction restraining the enforcement of the ordinance on the theory that the ordinance was void because it improperly imposed restrictions upon the use of the land which amounted to a denial of due process of law.

In the trial court, District Judge Westenhaver held the ordinance to be invalid. He said:

> "Nor, in my opinion, can it be doubted that the ordinance is void because its provisions are in violation of article 1, §1, Constitution of Ohio, which provides, 'All men * * * have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property,' and of article 1, §19, which provides, 'Private property shall ever be held inviolate,' and that, 'Where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury,' and also of section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides, 'Nor shall any state deprive any person of life, liberty, or property, without due process of law.' In reaching this conclusion, I assume that the village of Euclid, by virtue of article 18, §3, of the Constitution of Ohio, and section 4366—7 to 4366—12, inclusive, General Code of Ohio, possesses all the police power sought to be exercised which the Ohio Legislature might properly confer upon a municipality.
>
> * * *

"The argument supporting this ordinance proceeds, it seems to me, both on a mistaken view of what is property and of what is police power. Property, generally speaking, defendant's counsel concede, is protected against a taking without compensation, by the guaranties of the Ohio and United States Constitutions. But their view seems to be that so long as the owner remains clothed with the legal title thereto and is not ousted from the physical possession thereof, his property is not taken, no matter to what extent his right to use it is invaded or destroyed or its present or prospective value is depreciated. This is an erroneous view. The right to property, as used in the Constitution, has no such limited meaning. As has often been said in substance by the Supreme Court: 'There can be no conception of property aside from its control and use, and upon its use depends its value.'

* * *

"The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life."[16]

But, upon appeal to the United States Supreme Court, he was reversed and his interpretation of the law was repudiated. The decision was by a pre-New Deal Court.[17] In its opinion, the Court found no problem in upholding some of the regulations in the ordinance. It said (p. 388):

"There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding, and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances. See *Welch* v. *Swasey*, 214 U. S. 91; *Hadacheck* v. *Los Angeles*, 239

16. *Ambler Realty Co.* v. *Village of Euclid* (1924), 297 Fed. 307, 310, 313, 316 (Later reversed in 272 U. S. 365).

17. Opinion by Mr. Justice George Sutherland. Justices who concurred were: William Howard Taft, Oliver Wendell Holmes, Louis D. Brandeis, Edward T. Sanford and Harlan Fiske Stone. Justices who dissented were: Willis Van Devanter, James Clark McReynolds and Pierce Butler.

U. S. 394; *Reinman* v. *Little Rock*, 237 U. S. 171; *Cusack Co.* v. *City of Chicago*, 242 U. S. 526, 529, 530."

The main question was stated as follows (p. 390):

> "The serious question in the case arises over the provisions of the ordinance excluding from residential districts, apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question this Court has not thus far spoken."

In answering the question as to whether such an attempt by the municipality to limit the use of the land was valid, the Court said (p. 387):

> "The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities."

The Court then pointed out that the great majority of the state courts had sustained the power to exclude such uses from residential areas on the general theory that such ordinances are related to the health and safety of the community. The case of *City of Aurora* v. *Burns*, 319 Ill. 84, was quoted in part, with approval, as follows (p. 392):

> "The exclusion of places of business from residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is part of the general plan by which the city's territory is allotted to different uses in order to prevent, or at least to reduce, the congestion, disorder and dangers which often inhere in unregulated municipal development."

The Court then discussed the benefits which accrue from an exclusion of business and apartment houses from residential districts, reviewing the findings of experts and commissions. In closing, it said (p. 395):

> "If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we

have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."

—Subsequent events

In subsequent years the principles of zoning and the legal foundation for comprehensive zoning ordinances has been established in so many cases that it is no longer subject to question.[18] The *Euclid* case has been followed by the courts of last resort in most of the states. All the states, except New Mexico and Vermont, have cases either citing it with approval or following the principles there laid down.[19]

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18. Dr. Ernest M. Fisher well has said: "It may be taken for granted that zoning as a general process of public control of land uses has become firmly established in both constitutional and administrative law. Questions covering its legal status arise principally in connection with details of legislative provisions or administrative practice." "Economic Aspects of Zoning, Blighted Areas and Rehabilitation Laws," *American Economic Review Supplement* (March 1942), Vol. XXXII, No. 1, p. 331.

19. ALABAMA—*State ex rel. Turner* v. *Baumhauer*, 234 Ala. 286, 174 So. 514, 515.
ARIZONA—*City of Tucson* v. *Arizona Mortuary*, 34 Ariz. 495, 272 Pac. 923, 925.
ARKANSAS—*McKinney* v. *City of Little Rock*, 201 Ark. 618, 146 S. W. 2d 167, 168.
CALIFORNIA—*Jones* v. *City of Los Angeles*, 211 Cal. 304, 295 Pac. 14, 16.
COLORADO—*Hedgcock* v. *People ex rel. Reed*, 91 Colo. 155, 13 Pac. 2d 264.
CONNECTICUT—*Levine* v. *Board of Adjustment of City of New Britain*, 125 Conn. 478, 482, 7 Atl. 2d 222, 224.
DELAWARE—Appeal of Blackstone, 8 Harr. 230, 190 Atl. 597, 602.
FLORIDA—*State ex rel. Helseth* v. *DuBose*, 99 Fla. 812, 128 So. 4, 6.
GEORGIA—*Howden* v. *Mayor and Alderman of Savannah*, 172 Ga. 833, 159 S. E. 401, 407.
IDAHO—*City of Idaho Falls* v. *Grimmett*, 63 Idaho 90, 117 Pac. 2d 461.
ILLINOIS—*Western Theological Seminary* v. *City of Evanston*, 325 Ill. 511, 156 N. E. 778, 784.
INDIANA—*General Outdoor Adv. Co.* v. *City of Indianapolis*, 202 Ind. 85, 172 N. E. 309, 313.
IOWA—*Anderson* v. *Jester*, 206 Ia. 452, 221 N. W. 354, 356.
KANSAS—*Ware* v. *City of Wichita* (1923), 113 Kan. 153, 214 Pac. 99.
KENTUCKY—*Cayce* v. *City of Hopkinsville*, 217 Ky. 136, 289 S. W. 223.
LOUISIANA—*State ex rel. Manhein* v. *Harrison*, 164 La. 564, 114 So. 159, 161.
MAINE—*Inhabitants of York Harbor Village Corp.* v. *Libby*, 126 Me. 537, 140 Atl. 382, 386.
MARYLAND—*R. B. Const. Co.* v. *Jackson*, 152 Md. 671, 137 Atl. 278.
MASSACHUSETTS—*Nectow* v. *City of Cambridge*, 260 Mass. 446, 157 N. E. 618, 620.
MICHIGAN—*Dawley* v. *Collingwood*, 242 Mich. 247, 218 N. W. 766. See also, *City of North Muskegon* v. *Miller*, 249 Mich. 57, 227 N. W. 743.
MINNESOTA—*State ex rel. Beery* v. *Houghton* (1925), 164 Minn. 146, 204 N. W. 569.
MISSISSIPPI—*Snyder* v. *Campbell*, 145 Miss. 287, 110 So. 678, 681.

However, after the fundamental principle was clearly established, much litigation has occurred throughout the country to test out the question of whether or not specific zoning ordinances are unreasonable as applied to specific property and therefore void. Many decisions have held that municipal ordinances were unreasonable and invalid as applied to the facts of particular situations.[20]

So far there does not seem to have been any general feeling that there has been a misuse of the power of courts to exercise judicial control of zoning through ability to second guess the city planners or to relieve specific parcels of land from the limitations or burdens of over-all

MISSOURI—*State ex rel. Oliver Cadillac Co.* v. *Christopher*, 317 Mo. 1179, 298 S. W. 720, 725.
MONTANA—*Freeman* v. *Board of Adjustment of City of Great Falls*, 97 Mont. 342, 34 Pac. 2d 534, 537.
NEBRASKA—*Pettis* v. *Alpha Alpha Chapter of Phi Beta Pi*, 115 Neb. 525, 213 N. W. 835, 839.
NEVADA—*State ex rel. Roman Catholic Bishop of Reno* v. *Hill*, 59 Nev. 231, 90 Pac. 2d 221 (general principle upheld but not on the facts).
NEW HAMPSHIRE—*Sundeen* v. *Rogers*, 83 N. H. 253, 141 Atl. 142, 143.
NEW JERSEY—*Brookdale Homes, Inc.* v. *Johnson*, 126 N. J. L. 516, 19 Atl. 2d 868, 871. (See p. 868 for discussion of Constitutional Amendment.)
NEW MEXICO—No case found.
NEW YORK—*Lincoln Trust Co.* v. *The Williams Building Corp.* (1920), 229 N. Y. 313, 128 N. E. 209.
NORTH CAROLINA—*City of Elizabeth* v. *Aydlett*, 201 N. C. 602, 161 S. E. 78.
NORTH DAKOTA—*City of Bismarck* v. *Hughes*, 53 N. Dak. 838, 208 N. W. 711.
OHIO—*Pritz* v. *Messer*, 112 Ohio St. 628, 149 N. E. 30.
OKLAHOMA—*Barley* v. *City of Fredcrick*, 133 Okla. 84, 271 Pac. 257, 261.
OREGON—*Kroner* v. *City of Portland* (1925), 116 Oreg. 141, 240 Pac. 536, 539.
PENNSYLVANIA—Appeal of Ward, 289 Pa. 462, 137 Atl. 631.
RHODE ISLAND—*City of Providence* v. *Stephens*, 47 R. I. 387, 133 Atl. 614.
SOUTH CAROLINA—*Momeier* v. *John MeAlister, Inc.*, 203 S. C. 353, 27 S. E. 2d 504, 511.
SOUTH DAKOTA—*City of Sioux Falls* v. *Bessler*, 68 S. Dak. 635, 5 N. W. 2d 634.
TENNESSEE—*Spencer-Sturla Co.* v. *City of Memphis*, 155 Tenn. 70, 290 S. W. 613.
TEXAS—*Lombardo* v. *City of Dallas*, 124 Tex. 1, 73 S. W. 2d 483.
UTAH—*Smith* v. *Barrett*, 81 Ut. 522, 20 Pac. 2d 864, 866.
VERMONT—No case found.
VIRGINIA—*West Bros. Buick Co., Inc.* v. *City of Alexandria*, 169 Va. 271, 192 S. E. 881, 885.
WASHINGTON—*State ex rel. Seattle Title Trust Co.* v. *Roberge*, 144 Wash. 74, 256 Pac. 781, 782.
WEST VIRGINIA—*Parkersburg Builders Material Co.* v. *Barrack*, 118 W. Va. 610, 191 S. E. 369, 370.
WISCONSIN—*State ex rel. Carter* v. *Harper* (1923), 182 Wisc. 148, 196 N. W. 451.
WYOMING—*Weber* v. *City of Cheyenne*, 55 Wyo. 202, 97 Pac. 2d 667.

20. In *Euelid* v. *Ambler Co.* (1926), 272 U. S. 365, 397, the Court said:

"Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.

"And this is in accordance with the traditional policy of this Court. In the realm of constitutional law, especially, this Court has perceived the embarrass-

ordinances upon the theory that application of the ordinance to the facts in question demonstrates it to be unreasonable as applied to that land.

Nonconforming situations

Cities like New York, Chicago and Los Angeles grew to large size before effective effort was made to control their growth and development through the exercise of the police power. Much of their growth occurred before there was public acceptance of the ideas of city planning and comprehensive zoning. As a consequence, when zoning ordinances went into effect, they produced less than a perfect result. For one thing they had to be applied to the situations which had accumulated over the

ment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future eases must be fitted. This process applies with peeuliar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned."

Scores of such cases have been decided. Typical are:

2700 Irving Park Bldg. Corp. v. *City of Chicago* (1946), 395 Ill. 138, 69 N. E. 2d 827. Because the trend of the neighborhood surrounding premises in question had been industrial for 20 years, an ordinance rezoning for apartment purposes was held unreasonable and void with respect to that property.

De Mott Homes at Salem, Inc. v. *Margate City* (1948), 136 N. J. L. 330, 56 Atl. 2d 423, affirmed 136 N. J. L. 639, 57 Atl. 2d 388. An original zoning ordinance allowed two-family dwellings in the area. When the corporation purchased land to erect two-family dwellings, the zoning ordinance was amended to forbid two-family dwellings because the tax burden would fall on other taxpayers. Held: the amendment was invalid as to the corporation because unreasonable.

O'Connor v. *City of Moseow* (1949), 69 Ida. 37, 202 Pac. 2d 401. A zoning ordinance providing that any change of ownership in existing businesses devoted to pool, billiards, liquor, etc. is considered a new business and violation of other sections prohibiting new businesses in the area was held an unreasonable exercise of the police power.

Polk v. *Axton* (1948), 306 Ky. 498, 208 S. W. 2d 497. A spot zoning ordinance allowing one lot in a two-family residential area to be used for a four-family apartment house was held unreasonable. See also: *Cassel* v. *Mayor and City Council o Baltimore* (1950), 195 Md. 348, 73 Atl. 2d 486.

People ex rel. Joseph Lumber Co. v. *City of Chicago* (1949), 402 Ill. 321, 83 N. E. 2d 592. Land was purchased on reliance of zoning ordinance permitting use for manufacturing. Because of the character of the area, the fact that manufacturing was its best use, and that the value of residential property in the area would be little affected by manufacturing use, the ordinance rezoning it to residential was held unreasonable. See also: *Galt* v. *Cook County* (1950), 405 Ill. 396, 91 N. E. 2d 395; *The People ex rel. The Trust Company of Chicago* v. *The Village of Skokie* (1951), 408 Ill. 397, 97 N. E. 2d 310.

Hitchman v. *Oakland Tp.* (1951), 329 Mich. 331, 45 N. W. 2d 306. An ordinance requiring (1) dwellings to have a minimum of 800 sq. ft. of floor area at first floor level, (2) a minimum of 10,000 cubic feet of content, and (3) placed on not less than three acres with a frontage of 264 feet on a highway, was held unreasonable.

years and actually existed. For another they necessarily have a prospective rather than a retroactive effect.

As a result, one of the most serious problems in zoning regulation is that of "amortization of nonconforming uses." Generally, buildings which do not conform and uses which exist when an ordinance becomes effective, are permitted to continue. The theory has been that lawfully erected buildings should be allowed to stand and nonconforming uses exist because "zoning seeks to stabilize and protect and not to destroy."[21] As a concession to existing conditions, nonconforming uses and buildings are tolerated as long as they are not allowed to multiply and ultimately are to be replaced with those which do conform. Thus even zoning depends somewhat on hopes and the promise that time will correct past mistakes and result in greater uniformity of development.

Usually when a nonconforming use or building is abandoned, it may not be reinstated. Some zoning ordinances allow rebuilding in case of destruction. Some permit it only in cases of partial destruction. Generally they do not permit an owner to tear down a nonconforming building and then erect a new nonconforming building in its place.[22]

Meeting situations as they develop

Even comprehensive zoning ordinances cannot remain static. Urban conditions change in spite of diligent efforts to maintain the status quo. Facts never cease to happen because of legislative prohibitions. Changes may be slowed up and status quo may be prolonged but nothing is continuously stable. Neighborhoods change. Buildings grow old and unfashionable. People move to new areas and new houses which contain new equipment. Industry moves to rural areas and creates new towns. Whole cities spring into being on what had been farm lands.[23] Accumulated slums ultimately are replaced with modern housing, playgrounds, parks and curved streets while other areas sink into slums. The ebb and flow of the tide of population continues with irresistible force and

21. Edward M. Bassett, *Zoning* (New York 1936), p. 105.
See also: McDougal and Haber, *Property, Wealth, Land: Allocation, Planning and Development* (1948), Part III, p. 426 *et seq.*

22. Edward M. Bassett, *Zoning* (New York 1936), p. 111.

23. As, for instance, *Park Forest*, near Chicago, Illinois, where a large area of farm lands almost overnight became a thriving metropolis. The population today is 20,000 with an expected final population of 32,000 to 35,000. There are at present 2,400 single-family houses and 679 row houses containing 3,010 rental apartments. The project contains 2,400 acres of which 1,500 have been developed. The central commercial district contains 60 acres and two subsidiary commercial areas contain $2\frac{1}{2}$ and 4 acres, respectively. There are 400 acres of industrial land upon which development is just starting.

unremitting intensity.[24] And the most conscientious and farseeing local planners and legislators of necessity are incapable of completely controlling such dynamic forces.

The means used to keeping zoning sufficiently flexible to meet conditions as they develop and at the same time to maintain maximum benefits from the past efforts are two: (1) general amendments to the ordinance as they may be required, and (2) specific amendments, usually made after notice and hearing before a board of appeals and relating to specific realty as to which the application of the ordinance results in undue hardship.[25]

Recent developments—Off-street parking

Recent developments in municipal zoning have been the creation of buffer zones[26] and attempts to require off-street automobile parking in connection with heavily occupied buildings. An ordinance of this latter type came before the court in a very recent Illinois case. While it was ineffectual to accomplish the particular end sought, because it was of too limited application, it sheds some light on developments which probably will take place in many sections.[27]

A section of the Municipal Code of Chicago required apartment buildings to provide off-street automobile parking facilities on the lot where the apartment building is maintained, at the ratio of one automobile for each three apartments.

The Ronda Realty Corporation applied for a permit to remodel its building from 21 to 53 apartments, and certified it had provided off-street parking for 18 automobiles. The permit was issued.

Several tenants then went to the zoning board of appeals to have the action reversed. They claimed that the 53 apartments would require parking facilities for 18 automobiles under the Code and there was actually only space for 8 automobiles.

After a hearing before the zoning board of appeals, it was determined that there were not enough off-street parking facilities to comply with the ordinance, and the permit was revoked. The Ronda Realty Corporation then appealed to the circuit court for review and alleged the invalidity of the ordinance. That court held it unconstitutional and

24. For charts of recent population shifts both as between states and as between urban and rural areas, see 1950 Census, pp. xxii, xxiii.

25. Ordinarily state statutes contain specific provisions concerning variations, the creation of Boards of Appeals, administrative review of questioned decisions and judicial review of final administrative decisions. See Ill. Rev. Stat. 1953, Chap. 24, §73-3, 4, 5, 6.01 and 8.

26. *Evanston Best & Co., Inc.* v. *Goodman* (1938), 369 Ill. 207, 16 N. E. 2d 131.

27. *Ronda Realty Corp.* v. *Lawton* (March 23, 1953), 414 Ill. 313, 111 N. E. 2d 310.

void because it discriminated against the Realty Corporation. The tenants then appealed to the Illinois Supreme Court.

The question before that court was whether the relevant section of the zoning ordinance was invalid because it created an unlawful classification, discriminatory in its nature.

The court applied familiar rules of law. It reasoned thus:

> Cities have a right to impose a reasonable restraint upon the use of private property by enacting a zoning ordinance. The right of every owner of property to use it as he sees fit is subject to the police power, and zoning is an exercise of the police power. To be a valid exercise of the police power, an ordinance must bear a substantial relationship to the public health, safety, comfort or welfare. To accomplish these purposes, a legislative body may classify persons if the classification is based on a reasonable distinction having reference to the object of the legislation. A law will not be regarded as special or class legislation merely because it affects one class and not another, provided, it affects all members of the same class alike. A classification which is not purely arbitrary and is reasonably adapted to secure the purpose for which it was intended will not be disturbed by the courts unless it can be clearly seen that there is no fair reason for the distinction made. Even though a zoning ordinance is based on statutory authority and is designed to protect the public health or safety, it may not constitutionally effect an arbitrary discrimination against the class on which it operates by omitting from its coverage persons and objects similarly situated. A statutory classification can be sustained only when there are real differences between the classes and where the selection of the particular class, as distinguished from others, is reasonably related to the evils to be remedied by the statute or ordinance.

The court held that the section under scrutiny created an unlawful classification, both arbitrary and discriminatory in its nature, thus affirming the judgment of the circuit court. It said (p. 317):

> "Of all the different types of structures upon which the section is made to operate, it is only apartment buildings that are required to furnish off-street parking facilities. The evils to be remedied on crowded city streets are well known, but we do not see that the singling out of apartment buildings from the other types of buildings embraced by the ordinance is reasonably related to the elimination of those evils." * * *

"We see neither a fair nor reasonable basis for such a classification nor its reasonable relation to the object and purpose of the ordinance. The street congestion problems created by boarding or rooming houses, hotels, and the like, are not essentially different from those caused by apartment buildings. All are similarly situated in their relation to the problems of congestion that are caused by parking cars in the street, and all contribute proportionately to the evil sought to be remedied. Indeed, we think it not unreasonable to say that the scope and nature of the congestion may be greater in the case of large rooming houses and hotels than in the case of apartment houses. First, due to the comparative number of persons accommodated and, second, because the apartment dweller suggests a resident of some permanency who would seek to alleviate the problem of parking on the street, whereas the hotel or rooming house guest suggests a transient who makes no effort to solve his parking problem."

The final conclusion of the court was that the differences in kind between apartment buildings and other structures the section operated upon are not such to warrant the distinction created. However, the court did state that relieving congestion in the streets is a proper legislative purpose although it was not properly accomplished by this ordinance.

—Legislative designation of private persons as proper plaintiffs in suit to enjoin violation

Some cases have held that violation of a zoning ordinance may be enjoined at the suit of a private party who can show special damage, even though there is no statute which makes express provision for such an action by a private party. Other decisions, however have adopted a contrary view.[28] Some legislation is being enacted to clarify this situation. For instance in Illinois the Cities and Villages Act heretofore provided that suit to enjoin the violation of a zoning ordinance might be brought by the proper local authorities of the municipality, but nothing was said about the right of a private property owner to maintain such an action.[29]

In 1953 the General Assembly adopted an Act, effective as an emergency measure June 24, 1953,[30] which amends the statute so as to provide also that any owner or tenant of real property in the same contiguous zoning district as the building or structure in question may institute such

28. See annotation, 129 A. L. R. 885, supplementing a prior annotation in 54 A. L. R. 366.
29. Ill. Rev. Stat., 1951, Ch. 24, par. 73-9.
30. House Bill 609, 1953 Session; Ill. Rev. Stat., 1953, Ch. 24, §73-9.

a suit. Notice of the action must be given the municipality at the time suit is begun by serving a copy of the complaint on the chief executive officer of the municipality.

The amended section provides that the court may issue a preliminary or permanent injunction. It contains the seeds of considerable litigation for it further provides that if a permanent injunction is awarded "the court in its decree may, in its discretion, allow the plaintiff a reasonable sum of money for the services of the plaintiff's attorney. This allowance shall be a part of the costs of the litigation assessed against the defendant, and may be recovered as such."

Unsolved problems

Allied problems remain unsolved. Not the least of these is the administrative problem which arises out of the constant pressure of individuals who seek to profit by securing for themselves preferred classification of their holdings regardless of its effect upon the over-all situation, upon the assumption that zoning which permits an intensive use of land automatically establishes a level of land values consistent with actual use of the maximum intensity permitted.[31]

Practically every sizable American city, and certainly every large metropolitan area of today, is composed of a number of communities which gradually have been annexed to the original city as it has expanded. Municipal boundaries and local governments frequently bear little visible relationship to the metropolitan area. Many of the larger metropolitan areas include parts of two states. New York, Chicago and Kansas City furnish illustrations. So far, no clear solution has appeared indicating how to effect uniform controls of realty located in the different jurisdictions which constitute parts of the same urban area. Several alternatives exist: regional planning, the formation of new governmental entities, similar in concept to the New York Port Authority,[32] or joint action based upon unity of purpose and ideas without a single adequate compulsory entity. When the pressures arising from this circumstance become severe enough, solutions undoubtedly will follow.

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31. Dr. Ernest M. Fisher, "Economic Aspects of Zoning, Blighted Areas and Rehabilitation Laws," *American Economic Review Supplement* (March 1942), Vol. XXXII, No. 1, p. 333.

In a book review in the Harvard Law Review, Professor Allison Dunham makes reference to "the problems created by the use of this tool for snobbery, class segregation and protection of speculative economic interests * *." 62 Harvard Law Review (June 1949), 1414, 1417.

32. See Chicago Regional Port District Act (1951), amended 1953, Senate Bill 158, Ill. Rev. Stat., 1953, Ch. 19, §154, which creates "a political subdivision, body politic and municipal corporation" embracing lands located in Cook and DuPage Counties, Illinois.

CHAPTER FIVE

NEW CONCEPTS OF SOCIAL COMPULSION

Legal compulsion to prevent decay

One of the recent interesting influences of the metropolis upon the concepts, rules and institutions relating to property is found in an attempt to use the legal powers of the State to require property owners to keep their buildings in such condition as to prevent the decay and deterioration which result in the creation of slum areas. Even a generation ago there probably was no likelihood that courts would uphold legislation under which corporate authorities could decide for individual property owners what repairs or improvements must be made, under penalty that if their orders were disregarded public officials would take the action they had ordered, assert a lien upon the realty for the cost of the work done, and if necessary have the owner's equity sold to pay for the repairs he did not make. The General Assembly of Illinois recently adopted a statute aimed at those ends. It is known as the Urban Community Conservation Act.[1] In broad outline the Act seeks to bring about effective and preventive cooperation between property owners and city officials in districts which are deteriorating but still have salvage possibilities before they become actual slums. The mechanics for accomplishing these purposes involve definition of the affected area, initiation of specific plans by conservation boards working with local community councils, and with much of final judgment and ultimate power vested in the City Council and the courts.

The Illinois Urban Community Conservation Act

The Act provides for the creation of a Conservation Board by any municipality for the purpose of designating Conservation Areas in the municipality. A Conservation Area is defined as an area of not less than 160 acres in which the structures in 50 per cent or more of the area are residential, having an average age of 35 years or more, and which area is not yet a slum or blighted area as defined in the Illinois Blighted Areas Redevelopment Act of 1947, but which area by reason of dilapidation,

1. Ill. Senate Bill 524, 1953 Session, approved July 13, 1953, Ill. Rev. Stat., 1953, Chap. 67½ §§ 91.8-91.16.

obsolescence, deterioration or illegal use of individual structures, overcrowding of structures and community facilities, conversion of residential units into nonresidential use, deleterious land use or layout, decline of physical maintenance, lack of community planning, or any combination of these factors may become such slum or blighted area.

—The Conservation Board and its powers

The Conservation Board is empowered to designate conservation areas, and to appoint a Conservation Community Council for each Conservation Area to assist the Board. The Conservation Board has power to approve all conservation plans in the manner prescribed in the Act, approve each use of eminent domain for the acquisition of real property for the purposes of the Act and act as agent of the municipality in the acquisition, management and disposition of property.

The Conservation Board has power to acquire by purchase, condemnation or otherwise, any improved or unimproved real property for the purposes of the conservation plan; to remove or demolish substandard or other buildings from the property so acquired; to hold, improve and manage, sell, lease or exchange such properties. A purchaser or lessee of such property must agree to improve and use the same according to the conservation plan. If any owner of property in the conservation area, after notice shall fail to make such property conform to established minimum standards, the corporate authorities, upon the request of the Conservation Board, shall apply to the Circuit Court for an order permitting the corporate authorities to make such property conform to such minimum standards. The cost of making such repairs or improvements shall be a lien on the property affected.

—Purpose and procedure

The purpose of the statute is to grant additional powers to municipalities to enable them to prevent areas which are rapidly deteriorating and declining in desirability as residential communities from becoming slum or blighted areas.

The procedure set up permits any municipality to create a Conservation Board after a public hearing held on published notice. The Conservation Board consists of five members, including a presiding officer who is designated as Commissioner. The Commissioner must devote full time to his office, at such compensation as is fixed by the governing body of the municipality. The other members of the Commission must serve

without compensation. The presiding officer of the municipality, with the approval of its governing body and of the Illinois State Housing Board, appoints the members of the Conservation Board.

The Conservation Board, after investigation and at least one public hearing within the area, may designate an area as a Conservation Area.

—Participation by residents

The Board is required to appoint a Conservation Community Council for each Conservation Area, the members of which shall all be residents of and a majority be owners of real property within the Conservation Area. Such Councils are expected to assist the Board in the preparation and administration of the Conservation Plan of their respective areas and to approve by majority vote any Conservation Plan before it is submitted to the City Council.

—Conservation Plan

The Conservation Board has the duty of preparing or causing to be prepared a Conservation Plan for each Conservation Area. Such plan must conform to the comprehensive plan, if any, of the municipality. In preparing a Conservation Plan the Conservation Board must cooperate and consult with public and private agencies and individuals interested in the area. Upon completion the plan must be submitted to the City Council, together with a request for such implementing legislation as may be required. If the City Council adopts the plan, the Conservation Board certifies such plan as adopted. The Board may then exercise the powers granted under the Act and take such action as is necessary to effectuate the plan.

—Enforcement

If any owner or agent of improved private property within a Conservation Area, after notice to such owner or agent and to any mortgagee, shall fail to make such property conform to established minimum standards, the corporate authorities upon request of the Conservation Board shall apply to the Circuit Court for an order permitting the corporate authorities to make such improved property conform and to make the owner of such property pay for the expense of repairs or improvements necessary to bring the property up to such minimum standards. The cost and expense is made a lien upon the real estate affected, subordinate to all prior existing liens and encumbrances, provided that within 60 days after such costs are incurred the municipality or person performing the work files notice of lien. The lien thus created may be foreclosed.

The statute provides that the salary of the presiding officer of the Conservation Board be paid by the municipality. The municipality may provide the personnel necessary for the functions of the Board. The Act contains no provision concerning the financing of any conservation project, except the provision that the Conservation Plan as submitted and approved may include financing arrangements of public portions of the plan, and the provision giving a municipality or person repairing property a lien for such repairs.

The same session of the Illinois General Assembly adopted a companion measure to the Urban Community Conservation Act[2] to bring "Conservation Areas" within the scope of the State's existing Neighborhood Redevelopment Corporation Law. That Law, as it existed prior to the amendment, has been before the Supreme Court. It was held to be constitutional.[3] However, although it was passed in 1941 and had the legal blessing of the Court, the Neighborhood Redevelopment Corporation Law had not been used. Probably this nonuse was due to the fact that in order to avail itself of the power of eminent domain, a Neighborhood Redevelopment Corporation was required by the statute to own or have under option 60 per cent of the real estate in its redevelopment area. The 1953 amendment not only extends the powers of Neighborhood Redevelopment Corporation to lands which, while not slum and blighted areas, are on the verge of falling into that category, but it further provides that in lieu of owning 60 per cent of the area the Redevelopment Corporation may, as an alternative, have consents of the owners of 60 per cent of the areas to be bound by the terms of its development plan. The amendment increases the permissible size of the development area in municipalities of 500,000 or more from 80 acres to 160 acres and removes the necessity of insurance by the Federal Housing Administrator before municipalities and fiduciaries may invest in corporation mortgages.

—Possibility of political manipulation

It remains to be seen what attitude the courts will take toward the ideas embodied in the effort to preserve values and prevent decay by such legal compulsion. Also it remains to be seen whether meticulous, high-minded, public-spirited administration of an Act so obviously susceptible to the evils of political manipulation will over the years alleviate the dangerous conditions at which it is aimed.

2. Illinois Senate Bill 627 (1953 Session), Ill. Rev. Stat., 1953, Chap. 32, § 550.3-.12.

3. *Zurn* v. *City of Chicago* (1945), 389 Ill. 114, 59 N. E. 2d 18.

CHAPTER SIX

GOVERNMENTAL ACTIVITIES

The general objectives of governmental efforts

During the financial and real estate collapse and epidemic of mortgage foreclosures of the early thirties, Federal and State Governments took remedial measures aimed at many aspects of the problems which confronted their citizens. The resulting legislation was of two general types. One was a variety of emergency stopgap measures. The other encompassed long-range plans and activities in the fields of housing and real estate finance.

Despite their large number and their individual complexity, analysis of the many acts involved shows that through the years the legislative efforts of this kind which are found in Federal and State statute books have followed a fairly simple pattern. Federal acts have sought through governmental grant or subsidy or insurance or active participation to protect individuals and lending agencies against the inclement weather of financial disaster and to provide housing. In the main, State acts have sought three ends: one, to conform to the pattern of Federal acts in whatever manner was essential to permit the states and their municipalities to qualify for grants of Federal aid; two, to set up the necessary entities to implement the program embodied in Federal legislation; and, three, by mortgage moratoria laws, acts limiting the recovery of deficiency judgments against mortgagors, and similar measures to temper the storm which beset their citizens.

For a score of years every session of the Congress has continued to enact legislation of some sort affecting the area under consideration. And practically every session of the legislatures of the forty-eight states has done likewise. The net result is a maze of laws familiar only to the initiated. Volumes have been written about it and need not be repeated here or paraphrased. A chronological consideration of the details of the Federal and State acts adopted in the last twenty years either would require a treatise of unseemly length or result in the statement of a mass of detail of such complexity as to be unenlightening.

During that period, governmental efforts, legislative, executive, and judicial, to forestall the epidemic of mortgage foreclosures upon the homes of the people, to stimulate employment, to strengthen existing

institutions, to create new agencies of real estate finance, to change fundamental concepts concerning mortgage lending, to employ numerous aspects of the public welfare idea, including housing, slum clearance and neighborhood redevelopment, all have been parts of a great, shifting, seething effort, boiling up in one direction and then another, with ever-changing emphasis, frequent changes of administrative setup and innumerable changes of detail, reflecting the constant changes of personnel which took place. But throughout it all ran the one consistent idea that the public welfare must be served and whatever aided that end, as it was then conceived to be, was appropriate and therefore legal.

The coming to life of "general welfare"

These governmental activities required the reshaping of theretofore settled legal doctrines, the adaptation of the legislative process to changed social objectives and the creation of new governmental agencies.

Probably no single legal concept developed since cities have attained their present stature has had a greater influence upon the people, and particularly the urban portion of the population, their relations with their Government, and the power of that Government to reach into their daily lives and control their actions, than has the concept of "general welfare" as it was developed by the courts and implemented by the Congress. In the depths of the depression, the United States Supreme Court showed the way by resolving a constitutional argument which was as old as the Federal Constitution. In one of a dozen or more opinions which in a few short years rocked the legal world and reoriented the very fundamentals of American constitutional law, the Supreme Court breathed the breath of life into a giant named "general welfare." He arose with enormous power, power not yet measurable, but power which affects many of the legal rules and institutions relating to property. The case which served this purpose was one in which the Court held that the Agricultural Adjustment Act of 1933 was unconstitutional.[1] The fate of that particular Act was relatively un-

1. *United States* v. *Butler* (1935), 297 U. S. 1, 63-68. It would not be relevant to attempt to list the large number of historical cases of the following decade which involved the restatement of legal and constitutional principles of great importance. But among the significant cases were those like *United States* v. *Darby Lumber Co.* (1941), 61 S. Ct. 451, 312 U. S. 100; *United States* v. *South-Eastern Underwriters Ass'n* (1944), 64 S. Ct. 1162, 322 U. S. 533; *Santa Cruz Packing Co.* v. *National Labor Relations Board* (1938), 58 S. Ct. 656, 303 U. S. 453; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.* (1937), 57 S. Ct. 615, 301 U. S. 1; and *U. S.* v. *Wrightwood Dairy Co.* (1942), 62 S. Ct. 523, 315 U. S. 110, which rewrote the law concerning commerce and thereby opened the door to Federal regulation in areas which theretofore had been deemed purely intrastate.

important. The fact that an Act relating to agriculture was the target of the litigation, rather than one typical of the metropolis, was an incident rather than a controlling factor in the litigation. What the Court said laid the foundation for changing the life of the nation. Again the opinion was that of a pre-New Deal Court. The majority opinion was written by Mr. Justice Roberts. It was concurred in by Chief Justice Hughes and Justices Van Devanter, McReynolds, Sutherland and Butler. Justices Stone, Brandeis and Cardozo dissented. The Court said (p. 64, *et seq.*):

> "The clause [of the Federal Constitution] thought to authorize the legislation,—the first,—confers upon the Congress power 'to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States * * *' * * * The Government concedes that the phrase 'to provide for the general welfare' qualifies the power 'to lay and collect taxes.' The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. Mr. Justice Story points out that if it were adopted 'it is obvious that under color of the generality of the words, to "provide for the common defence and general welfare," the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers.' The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare.
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> * * *
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> "Since the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress conse-

quently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to weight. This court has noticed the question, but has never found it necessary to decide which is the true construction. Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position. We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."

With that concept triumphant, legal theories and precedents of earlier times became of little importance except as they indicated areas of inevitable change. More than ever true were the words of the legal prophet, "Hardly a rule of today but may be matched by its opposite of yesterday."[2]

The contribution of the metropolis to the problems of an urbanized economy

The extent to which metropolitan problems and pressures have been responsible for the legislation and administrative measures which followed the broadening of Federal power cannot be measured with exactness. Undoubtedly it can be said that the agencies and institutions which then came into existence were the product of the economic depression which overtook the world in the late twenties, and that the remedial measures evolved to meet the depression while largely affecting the urban majority of the population made no sharp distinction as between urban and rural ills.[3] But although the metropolis was not

2. Hon. Benjamin N. Cardozo, *The Nature of the Judicial Process*, p. 26.

3. President's Annual Message to the Senate and House of Representatives, December 8, 1931 [75 Cong. Rec. 22, 24 (1931)]: "I recommend the establishment of a system of home-loan discount banks as the necessary companion in our financial structure of the Federal reserve banks and our Federal land banks. Such action will relieve present distressing pressures against home and farm property owners* * *"

See also: President's Message to the Senate and House of Representatives, January 4, 1932 [75 Cong. Rec. 1263 (1932)], and HOME FINANCE AND TAXATION, *Loans, Assessments and Taxes on Residential Property*, Vol. II, The President's Conference on Home Building and Home Ownership, Washington, D. C. (1932), pp. 98, 99.

solely responsible for the depression certainly it contributed. In one of the landmark cases of the 1930's, which demonstrated the changed judicial conception of Federal power, the United States Supreme Court, in building up to its conclusion that the Congress had power to enact Title VIII of the Social Security Act concerning old age benefits for city workers, summoned as one of its compelling reasons the fact that:

> "More and more our population is becoming urban and industrial instead of rural and agricultural."[4]

Doubtless it was the economic troubles of farmers which showed the way to governmental financial aid as a solution of individual financial difficulties, for it was inability to obtain adequate farm mortgage funds which in 1916 led to the creation of the first of these agencies, the Federal Land Bank System. But the real estate mortgage collapse in the early thirties was followed by a whole series of new institutions and agencies designed to rescue from financial disaster what by then had become a predominantly urban population.

In the depression and urban atmosphere, political and social measures were geared largely to the voting power and needs of city workers. Obviously many of the governmental agencies which have been brought into being as a result of the people's demand for and reliance upon bigger and better governmental aid in the property field have to do primarily with urban realty, for their essential function is to help to provide housing for the private individual in the metropolis, so it seems necessary briefly to review the Federal activities which since then have become an accepted factor in the world of city realty.

The Federal program

Federal legislation created a program of much power and many facets. It brought into being in the field of realty Federal aid of many kinds, Federal aid to individuals, Federal aid to mortgage borrowers, Federal aid to mortgage lenders. In most of the large cities in the land it brought Federal aid to State housing bodies and local public agencies created to aid in slum clearance and formed by cooperation with the State. Everywhere it brought Federal participation in real estate transactions which theretofore the Federal Government had had no part in. It created a highly complex series of inter-governmental efforts to house the people through public housing or private enterprise and to bring about neighborhood redevelopment by governmental cooperation with private capital.

4. *Helvering* v. *Davis* (1937), 301 U. S. 619, 642.

To carry out the program and to meet segments of the problem, many agencies were created by the Federal Government. They depended upon different theories for existence. In general, they operated by pouring Government money or Government credit into threatened areas. Some, like the rescue operations of Home Owners' Loan Corporation, and some phases of the operations of Reconstruction Finance Corporation, and later the Veterans' Administration,[5] put the Government directly into business contact with its citizens in connection with their individual financial investments and obligations on mortgage loans. Some, like Federal Housing Administration and the Federal Home Loan Bank System, by employing the concept of governmental insurance, offered both incentive and protection and also set technical standards of performance, which in many ways changed the thinking and habits and business fashions of the time. One of the most dramatic of these was bringing about public acceptance of Government-insured, long-term amortized loans on urban real estate, with the principal of the mortgage being a high percentage of the value of the security. In a surprisingly short period of time home loans of this type practically superseded what had been considered to be conservative, small percentage, fixed-term loans, which would be continued indefinitely.

As a result of these complicated legislative efforts the Veterans' Administration, the Reconstruction Finance Corporation, Federal National Mortgage Association, Community Facilities Service, Home Loan Bank Board, and a host of other legislatively created entities, by statute, have some part, some function, in the field of urban real estate. Some of their activities are frankly paternalistic, presumably protecting the mortgage borrower from his own ignorance or bad judgment and against the traditional money lender. Others of the activities seek to protect the investor in mortgages or mortgage pools against loss in the event of another economic collapse. The figures involved run to staggering totals.

A large segment of governmental activity primarily was dedicated to the task of providing living quarters for private individuals in the cities of the nation. It took the form of assistance to a buyer in the private enterprise market, insurance of mortgage debt, public housing for people who allegedly cannot afford housing offered by private enterprise,

5. The Veterans' Administration was established as an independent agency under the President by Executive Order 5398, of July 21, 1930, in accordance with an act of July 3, 1930 (46 Stat. 1016; 38 U. S. C. A. 11). It has power both to guarantee home loans and to make direct home loans. Its activities in these fields aggregate about 19½ billions of dollars.

clearance of slums and redevelopment of blighted areas, control of rents according to the interests of tenants, and temporary emergency housing for war workers. Most of these were areas which theretofore generally had been considered to be an individual's own responsibility. The remedies devised were typical of the political atmosphere in which they were born. They were the start of a program which developed to unprecedented proportions in a few years and whose limits cannot yet be defined either in the national scene or in the world-wide social revolution which presently is racking the earth and all of its inhabitants.

Acceleration by war

The emergencies of World War II came upon a people considerably conditioned to governmental supervision and control and it called forth more governmental activity than the nation ever had seen or the founding fathers could have envisioned. In addition to the ideas which by then had become commonplace, it was characterized by further Federal regulations and controls which affected the daily life of every individual. Rent control became an economic, social and political factor. War agencies sprang into being. Existing Federal programs were stepped up. There was direct building activity by the Federal Government to meet the housing needs of the military and industrial forces. Individual freedom of action came to an all time low. These measures had their greatest application in the urban centers for the cities carried the burden of industrial mobilization.

A. FEDERAL LEGISLATION

Channels of governmental action

The following chart shows the channels which Federal governmental legislation has taken in its effort to accomplish these purposes. It also indicates the extent to which the Federal Government has furnished the initiative and set the pattern for every type of activity in that field.

CHANNELS OF FEDERAL LEGISLATION IN THE FIELD OF HOUSING

I

Financial Operations to Assist an Individual to Purchase a House Offered by Private Enterprise:

Federal Home Loan Bank Act (1932)
- (a) Federal Home Loan Bank System (1932)
- (b) Federal Home Loan Bank Board (1932)

Reconstruction Finance Corporation Act (1932)
- (a) RFC Mortgage Company (1935)
- (b) Prefab. Housing Activity (Housing Act of 1948)

Home Owners' Loan Act (1933)
- (a) HOLC (1933)
- (b) Federal Savings and Loan Assns. (1933)

National Housing Act of 1934
- (a) FHA (1934)
- (b) Federal Savings and Loan Insurance Corp. (1934)
- (c) Federal National Mortgage Assn. (1938)

Servicemen's Readjustment Act (1944)

Veterans' Emergency Housing Act (1946)

Housing Act of 1948

Housing Act of 1950

Defense Production Act (1950)

Housing Amendments of 1953

II

Direct Subsidy By Way of Public Housing and Slum Clearance to Aid in Housing Private Individuals who Cannot Afford to Rent or Purchase a House Offered by Private Enterprise:

Emergency Relief and Construction Act (1932)

National Industrial Recovery Act (1933) (Housing Division of PWA)

U. S. Housing Act of 1937

Housing Act of 1949

III

Provision of Housing During Wartime:

Lanham Act (1940)
Defense Homes Corp. (RFC 1940)

FHA (Modified for Wartime Activity)

Defense Housing and Community Facilities and Services Act of 1951

IV

Temporary Alleviation of Housing Shortages (Stopgap Housing):

Lanham Act (1940) (Utilization of Wartime Structures for Temporary Veterans' Housing)

Housing Act of 1950 (College Housing)

V

Rent Control:

Emergency Price Control Act of 1942

Housing and Rent Act of 1947

Housing and Rent Act of 1953

CHART 7

Parts of the chart warrant further comment. In connection with it, the following brief references are provided to the major Federal acts which created the necessary agencies and operated in other ways to carry out the Federal program. Attempting to summarize a statute other than in a most general fashion is reckless, if not impossible. Its import, effect, scope and limitations can only be ascertained by study of the full text. Consequently, the following summaries or references must be taken merely as an indication of broad areas of legislative effort, rather than as an accurate condensation of the statutes.

CHANNELS OF FEDERAL LEGISLATION IN THE FIELD OF HOUSING

I.

Financial operations to assist an individual to purchase a house offered by private enterprise

Important among the first of the Federal statutes to be enacted was a group of statutes designed to strengthen savings and loan operations in a number of ways. Basic in this area were acts relating to:

(a) Federal Home Loan Bank System and Federal Home Loan Bank Board[6]

Creation. The Federal Home Loan Bank System was created following the financial collapse of 1932. The act creating it was one of a number of new laws to support credit and relieve the desperate situation resulting from the closing of all the banks and the overwhelming of the building and loan associations of the country. In what then was termed the building and loan field, and since has become known as the savings and loan field, the relief was centered in the provisions of statutes designed to do three things: (1) to furnish new credit and liquidity to associations, (2) to permit the creation of new Federal associations, and (3) to insure individual shareholder's investments in associations.

6. Formed under the Federal Home Loan Bank Act—approved July 22, 1932, 47 Stat. 725; 12 U. S. C. A. 1421-1449.

The first of these ends was sought to be accomplished by the enactment of the "Federal Home Loan Bank Act"[7] in July 1932. This Act established the Federal Home Loan Bank System.[8] The System originally consisted of twelve regional and inter-related Federal Home Loan Banks operated under the supervision of the Federal Home Loan Bank Board, which has its headquarters at Washington. In each district is a Federal Home Loan Bank. In 1946, the number of districts was reduced to eleven by the consolidation of two Pacific Coast districts. The Federal Home Loan Bank Board, the name of which has since been changed to "Home Loan Bank Board," was given broad and flexible powers in carrying out the detail of the legislation.[9]

Purpose. The purpose of the System as stated by the Federal Home Loan Bank Board[10] is:

> "The Federal Home Loan Bank System was created to give greater flexibility and expansion of lending powers to member building and loan associations and similar private thrift and home-financing institutions. The System is a permanent credit reserve structure for the use of private home-financing institutions. It permits them to expand their lending power by the use of their present resources as collateral, very much as the Federal Reserve System permits commercial banks to increase their credit for industry. The System was established to protect home owners against a repetition of the dangers which they faced a few years ago in the scarcity of home-mortgage credit. It places an additional large volume of credit at the disposal of the private home-lending institutions so that they may make a larger number of mortgage loans to home owners on reasonable terms and also meet more readily the cash re-

7. 12 U. S. C. A., Chap. 11, § 1421, *et seq.*

8. The Federal Home Loan Bank Act approved July 22, 1932, has since been amended by the Home Owners' Loan Act approved June 13, 1933, by an Act to guarantee the bonds of the Home Owners' Loan Corporation approved April 27, 1934, by the National Housing Act approved June 27, 1934, by an Act to provide additional home mortgage relief approved May 28, 1935, by an Act to amend the National Housing Act approved March 28, 1941, the Public Debt Act of 1941 approved February 19, 1941, as amended by the Public Debt Act of 1942 approved March 28, 1942, and by Reorganization Plan No. 3 of 1947 effective July 27, 1947, and by amendments to the Federal Home Loan Bank Act approved August 1, 1947, June 27, 1950 and September 1, 1951.

9. Federal Home Loan Bank Act, July 22, 1932, 12 U. S. C. A., Chap. 11, § 1421, *et seq.*

10. Third Ann. Rep. H. L. B. B., 1935. See also 1950 Rep., p. 171.

quirements of their investors. The System is susceptible of wide expansion. It encourages a general pooling of resources of member institutions to insure stability and arranges for the transfer of funds from a section of the country in which demand is quiet to a section in which it is more active."

The activities of the Home Loan Bank System are not confined to savings and loan associations. Cooperative banks, savings banks and insurance companies also may be members.

Theory of operation. It is the theory of the Federal legislation that in good times and bad the Home Loan Bank System provides a flexible source through which associations so desiring may achieve liquidity.[11] In time of dire need, power exists under the Act through which the Federal Savings and Loan Insurance Corporation can resort to outright beneficence by actually giving moneys to associations which are in trouble.[12] The pool of reserve credit afforded by the Federal Home Loan Bank System arises through (1) paid-in capital, (2) deposits of member institutions, and (3) sale of its obligations.[13]

The capital stock of the district banks is purchased in part by member institutions and the remainder by the United States. The law provides further that the Government's stock be gradually retired by the member institutions.[14] Additional loanable funds may be acquired from deposits of member institutions and other district banks, and from the issuance of debentures, bonds or similar obligations.

All Federal associations are required to be members of the Federal Home Loan Bank System. Membership in it also is available to any State association which meets the prescribed requirements and which purchases stock in its local Federal Home Loan Bank.[15]

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11. The detailed requirements as to what constitutes acceptable collateral security for advances is set forth at 12 U. S. C. A. 1430, as amended.

12. 12 U. S. C. A. 1729(f). See also §§ 1430, 1431(h), 1464, *et seq.*, 1724, *et seq.* To date these gifts have aggregated about five millions of dollars, all prior to 1945. 1947 H. L. B. B. Rep., p. 52.

13. The Secretary of the Treasury is given power and discretion in this area up to $1,000,000,000. 12 U. S. C. A. 1431(i). See also 12 U. S. C. A. 1725(i).

14. 12 U. S. C. A. 1426(g) and (l).

15. Under the Federal Home Loan Bank Act, any building and loan association or savings and loan association is eligible to become a member of or a nonmember borrower from a Federal Home Loan Bank if such institu-

Members and nonmember borrowers may apply for advances.[16] The banks can make these advances upon the security of home mortgages (not more than a four-family dwelling), obligations of the United States or obligations guaranteed by the United States. The operations of the Bank System are granted a broad tax exemption.

The Home Loan Bank Board was created as a constituent agency of the Housing and Home Finance Agency by the President's Reorganization Plan 3 of 1947.[17]

(b) Federal Savings and Loan Associations[18]

The legislation creating Federal savings and loan associations and providing for them to enter an area which theretofore had been the exclusive domain of State building and loan associations marked one of the early, significant and important steps in a great shift from State to Federal power and activity which took place during the thirties.

Creation. The Federal Home Loan Bank Board was given authority to provide for the organization, incorporation, operation, examination and regulation of Federal savings and loan associations. Upon incorporation, an association automatically becomes a member of the Federal Home Loan Bank in its district.

Purpose. The stated purpose of the organization of Federal savings and loan associations was to "provide local mutual thrift institutions in which people may invest their funds * * *" and to assist in providing home financing.[19]

Capital. The statute authorized the Secretary of the Treasury to subscribe for preferred shares in the associations on behalf of the United States, to a limited amount. Each association shall

tion (1) is duly organized under the laws of any state or of the United States, (2) is subject to State or Federal inspection and regulation, and (3) makes such home mortgage loans as in the judgment of the Board are long-term loans. 12 U. S. C. A. 1424(a). An eligible institution may become a member only of the Home Loan Bank of the district in which its principal place of business is located. 12 U. S. C. A. 1424(b).

16. See note 11, *ante*.

17. U. S. Govt. Organization Manual, 1953-54, p. 407.

18. Home Owners' Loan Act of 1933, as amended, 48 Stat. 132, 12 U. S. C. A. 1464, *et seq.*

19. 12 U. S. C. A. 1464(a).

eventually retire these preferred shares. The Secretary of the Treasury may also subscribe for any amount of fully-paid income shares which are to be gradually repurchased. The statute provides the associations with liberal tax exemptions.

Operations. In effect, Federal savings and loan associations are an outgrowth under Federal auspices of State building and loan associations. They have acquired many resemblances to mutual savings banks. Their chief operation consists of acquiring the investment funds of members and lending these funds to borrowers upon the security of real estate mortgages. They operate without legal necessity of as high liquidity as is required of banks of deposit generally, because they have different legal requirements concerning the withdrawal of members' investments. The associations are limited in the loans they may make. Ordinarily they lend money upon the security of their shares or upon moderate-size first liens on homes (or combination homes and business property) within a few miles of their home office. In addition they may invest in Government bonds, in stock or bonds of a Federal Home Loan Bank and in certain other permitted loans.[20] Recent amendments provide machinery for the conversion of Federal associations into State associations and State associations into Federal associations.[21]

(c) The Federal Savings and Loan Insurance Corporation

Purpose. The Federal Savings and Loan Insurance Corporation[22] was organized to insure the safety of the investments which people make in Federal savings and loan associations and other thrift and home-financing institutions. The statute provides for direction of the insurance corporation under a board of trustees, who also are the members of the Federal Home Loan Bank Board.

Creation. On June 27, 1934, the Corporation was created a body corporate and an instrumentality of the United States.[23] The Home Owners' Loan Corporation was directed to subscribe for the capital stock and pay for it with its bonds.[24]

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20. 12 U. S. C. A. 1464(c) as amended July 14, 1952.

21. 12 U. S. C. A. 1464(i) as amended July 14, 1952.

22. Created by Subchapter IV of the National Housing Act, June 27, 1934, Ch. 847, 48 Stat. 1246, 12 U. S. C. A. 1724-1730.

23. 12 U. S. C. A. 1725(c).

24. 12 U. S. C. A. 1725(b). As to retirement of capital stock, see 12 U. S. C. A. 1725(h) as amended June 27, 1950.

Powers. It was granted the authority to borrow money, and to issue notes, bonds, debentures and other similar obligations. The Corporation and its obligations were also granted a liberal tax exemption.

Operations. In its operation, the Corporation insures the accounts of all Federal savings and loan associations and has broad powers to prevent defaults in insured institutions and to restore to normal operations an institution which has been in default.[25] It also may insure the accounts of building and loan, savings and loan, homestead associations and cooperative banks organized under State laws.[26] The eligibility of an association for insurance depends upon its financial condition and policies.[27] The statute provides for a premium and additional assessments to meet losses. The top amount of insurance for each account is $10,000.[28]

Home Owners' Loan Corporation

Creation. The Home Owners' Loan Corporation was formed in 1933, under the Home Owners' Loan Act by and under the direction of the Federal Home Loan Bank Board.[29]

Purpose. Its purpose was to help families prevent loss of their homes through mortgage foreclosure.[30] It conducted what doubtless was the most effective and broadest financial rescue operation which ever has occurred in the real estate mortgage field.

Capital. The Reconstruction Finance Corporation was required to furnish money to the Secretary of the Treasury, who used it to subscribe for the capital stock on behalf of the United States. To provide funds for its purposes, the Corporation was permitted to issue Government-guaranteed bonds which could be exchanged, sold or used to redeem its outstanding bonds. The Secretary of the Treasury could also purchase these bonds, which were granted a tax exemption along with the Corporation.

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25. 12 U. S. C. A. 1729(f).

26. 12 U. S. C. A. 1726(a).

27. 12 U. S. C. A. 1726(b) and (c).

28. 12 U. S. C. A. 1724(b) as amended July 16, 1952, and 1728 as amended June 27, 1950.

29. Formed under the Home Owners' Loan Act, approved June 13, 1933, 48 Stat. 128, 12 U. S. C. A. 1461 *et seq.*

30. C. Lowell Harriss, *History and Policies of the Home Owners' Loan Corporation* (1951), p. 1.

Operations. The Corporation carried out a great rescue operation on behalf of home owners who had become unable to meet their mortgage obligations and were involved in or under threat of losing their homes through mortgage foreclosure. It proceeded to acquire home mortgages, most of which were in default and many of which were in foreclosure, in exchange for its bonds. In such exchanges it could advance cash to pay taxes, assessments, maintenance and repair costs, and costs of the transaction. These mortgages were carried as a first lien or refinanced as a home mortgage on the basis of the price paid by the Corporation. They were amortized by monthly payments to retire the obligation in not more than 25 years.

If the holder of a home mortgage refused to accept HOLC bonds in exchange for his mortgage and the home owner was unable to procure a loan from ordinary lending agencies, the Corporation could make cash advances also secured by a home mortgage. Authority was also given to exchange bonds or advance cash to redeem homes lost by foreclosure or forced sale.

The Corporation was directed to retire and cancel its stock and bonds as quickly as possible with the payments on principal of the loans made under the statute and to liquidate when its purposes were accomplished. By the Housing Amendments Act of 1953, HOLC was officially dissolved.

Ultimately it put over three billions of dollars of new money into refinancing more than a million home mortgages [31] and liquidated with general public approval of its record.

RFC Mortgage Company

The RFC Mortgage Company was formed to help re-establish a normal mortgage market.[32] It operated as a wholly owned subsidiary of the Reconstruction Finance Corporation, making direct loans for refinancing mortgages in some cases, and for new construction in others. It was formed under the authority of Section 5c of the Reconstruction Finance Corporation Act, as amended.

Section 5c gave the Reconstruction Finance Corporation power,

31. C. Lowell Harriss, *History and Policies of the Home Owners' Loan Corporation*, p. 29.

32. RFC Mortgage Company was organized under the laws of Maryland on March 14, 1935, pursuant to Section 5c of the Reconstruction Finance Corporation Act, as amended, added by the Act approved January 31, 1935, 49 Stat. 1, 15 U. S. C. A. 606(i).

on approval of the President, to subscribe for or make loans upon the nonassessable stock of any national mortgage association and of any mortgage loan company, trust company, savings and loan association, or other similar institution formed under Federal or State law, whose principal business is making home mortgages. If any such institution was not able to issue nonassessable stock, the Reconstruction Finance Corporation could purchase its legally issued capital notes or debentures.

RFC Prefabricated Housing Activity (1948)

By an Act approved August 10, 1948,[33] the RFC was given authority to finance the production, manufacture, distribution, sale, purchase, or erection of prefabricated houses or site improvements therefor. Reorganization Plan 23 of 1950 [34] transferred all of these functions to the Housing and Home Finance Administrator.[35]

Federal Housing Administration

Creation. The Federal Housing Administration has become a very important agency in connection with the lending of mortgage money secured by the pledge of city homes. It was established in 1934 at almost the peak of the mortgage foreclosure period which accompanied the collapse of real estate values throughout the country.[36] It now functions as one of three constituent agencies of the Housing and Home Finance Agency.[37] It is one of the outstanding tools of the Government in the mortgage lending field. Also probably it is the leading example of governmental agencies which actively and directly participate with large numbers of citizens in the details of their personal financial affairs. Its principal function is to afford individuals and institutional mortgage lenders protection in financial matters, of a kind which was unheard of and probably unthought of before the depression. Through utiliz-

33. 62 Stat. 1275, 12 U. S. C. A. 1701(g).

34. Effective June 9, 1950, 15 F. R. 4366, 64 Stat. 1279, 12 U. S. C. A. 1701(g). See also 12 U. S. C. A. 1701(c).

35. Created by Reorganization Plan No. 3 of 1947, 12 F. R. 4981, 61 Stat. 954, 5 U. S. C. A. 133 y-16, p. 112.

36. Formed under Subchapter 1 of the National Housing Act, approved June 27, 1934, Ch. 847, 48 Stat. 1246, 12 U. S. C. A. 1701-1733. Subchapter II, setting up a Mutual Mortgage Insurance Fund to be operated by the FHA, is also considered here.

37. Reorganization Plan 3, 1947; U. S. Govt. Organization Manual, 1953-54, p. 410.

ing the concept of insuring against loss in the transactions within its scope, it has come to have tremendous influence and power in the area of smaller mortgage transactions secured by the pledge of homes in the metropolitan centers of the country. From its inception, it broke away from the then accepted mortgage practices and set styles and adopted procedures which largely changed the course of business in the field of its activity. Chief among these was the basic idea of substituting for the then prevailing single element of appraisal of land and building a much broader concept which was that the making of a real estate mortgage loan involves evaluating both the likelihood that the mortgagor will and can repay the money he borrows and, over a long period of time, can and will keep the mortgaged premises free from tax defaults and other hazards which the depression had highlighted. Another of its innovations was the making of high percentage loans subject to a requirement of repayment of the loan in equal periodic installments of a size adequate to amortize the loan within the period of its existence, in addition to providing for payment of interest upon the mortgage debt, an FHA mortgage insurance premium of one-half of one per cent annually on outstanding balances of principal, fire and other hazard insurance premiums, real property taxes and installments of special assessments levied for local improvements.

Purpose. Its chief purpose was to insure eligible institutional mortgage lenders against loss in prescribed lending operations in the home mortgage field through a system of mutual mortgage insurance, to stabilize the mortgage market, and to encourage improvement in housing standards and conditions.[38] It also insures yields on investments in rental housing for families of moderate income where no mortgage financing is involved. It does not make loans nor does it build houses.[39] Its operations have been adapted to the economic situation of the country as it has varied through depression, postdepression and war years.

Operations. The Federal Housing Administration operates under a statute which has been amended by the Congress many times to

38. 12 U. S. C. A. 1702.

39. 12 U. S. C. A. 1747, *et seq.*, U. S. Govt. Organization Manual, 1953-54, p. 410.

meet changed conditions and new pressures.[40] Because there has been a great volume of FHA activities in urban areas and an apparent public and legislative acceptance of FHA as a permanent factor in urban mortgage lending, the statute under which FHA operates requires fuller consideration than some other acts.

In form, the statute treats various subjects under different titles. Under Title I of the Act, the Federal Housing Commissioner is authorized to insure banks, trust companies, personal finance companies, mortgage companies, building and loan associations, installment lending companies and other qualified institutions which he approves for credit insurance. They are insured against losses they may sustain from:

1. Loans made by them for alterations, repairs and improvements of existing buildings;
2. Loans for the building of new houses; and
3. Loans made for restoration, rehabilitation, rebuilding and replacement of houses destroyed by disasters.

The essence of the FHA legislation is found in its provisions which create a Mutual Mortgage Insurance Fund to be used as a revolving fund to carry out the FHA insurance program. The first step in this program is determination that a mortgage is eligible for insurance under the statute. The Act sets an upper limit on the total amount of mortgages which may be insured and states the requirements for eligibility. Once a mortgage loan has been made and insured as an eligible loan, the parties to the transaction continue the normal relationship and activities of mortgagor and mortgagee unless a default occurs. In the event of a serious default, a mortgagee becomes entitled to the benefits of the mortgage insurance when he has foreclosed the mortgage and has taken possession of the property. At this time, he must convey title and assign his interest in the mortgage transaction to the Commissioner.

40. The National Housing Act, approved June 27, 1934, C. 847, 48 Stat. 1246, 12 U. S. C. A. 1701, *et seq.*, has since been amended by the National Housing Act Amendments of 1938, approved February 3, 1938, the National Housing Act Amendments of 1942, approved May 26, 1942, the Veterans' Emergency Housing Act of 1946, approved May 22, 1946, the Housing and Rent Act of 1947, approved June 30, 1947, the 1947 Reorganization Plan No. 3, effective July 27, 1947, the Act to amend the National Housing Act, approved August 5, 1947, the Housing Act of 1948, approved August 10, 1948, the Act to amend the National Housing Act, approved August 8, 1949, the Housing Act of 1950, approved April 20, 1950, the Defense Housing and Community Facilities and Services Act of 1951, approved September 1, 1951, and by the Housing Amendments of 1953, approved June 30, 1953.

For this he receives debentures having the face value of the mortgage and a certificate of claim entitling him to participate in any excess proceeds when the Commissioner disposes of the property. These debentures bear interest and mature three years after the maturity date of the mortgage for which they were exchanged. In addition, they are guaranteed by the United States and allowed a tax benefit. The Commissioner has the power to dispose of and generally deal with the property conveyed to him in exchange for the debentures and certificate of claim.

Some provisions of the FHA legislation deal with homes, some with two-family, three-family and four-family dwellings. Some deal with property improvement loans, others with homes for families of low and moderate income, cooperative housing projects, rental projects of large size, defense housing and even loans to finance the production of prefabricated houses.[41]

FHA activities are notable both for volume of transactions and flexibility of program. Insurance written by FHA from 1934 through 1952, under all of its programs, totaled more than 29 billions of dollars. During this period, mortgages were insured on over three million homes and on rental and cooperative housing projects containing more than 600,000 dwelling units. In addition, over 14 million loans were made for financing, repairs and improvements to properties.[42] Its aggregate activities[43] represent the ordinary everyday activities of countless individual borrowers and lenders in the conduct of what not long ago would have been considered to be exclusively their own affairs.

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41. In addition to its principal activities, the FHA operates in other areas of finance. Under Title II, the FHA insures mortgages on rental housing projects operated by Federal or State regulated agencies or limited-dividend corporations. Title VII was added to supplement the Title II mortgage insurance for low-rental projects. The Commissioner must be satisfied that such a project is needed and has power to regulate rentals by his approval of rent schedules. Title VIII was added to provide mortgage insurance for military rental housing. Title VI provided authority for the insurance of mortgages on war housing. This Title was later amended to provide mortgage insurance for World War II veterans to build homes, for the sale of Government housing (Federal, State or local) and for large scale public housing projects. Title X was added to provide mortgage insurance for national defense housing. The Housing Act of 1950 included Title IX which provided for loans to educational institutions and also added a section to Title II authorizing the insurance of mortgages on cooperative housing projects.

42 6th Annual Report, Housing and Home Finance Agency, p. 209.

43. See Statistical and Financial Summaries of FHA Operations, Insured Mortgage Portfolio, Vol. 18, No. 1, Fall 1953, p. 28.

So far its main operations have been in a period of boom and frantic building of small homes during a rising real estate market. It is untested by any serious recession.[44] How it will fare under adverse conditions, if they arise, remains to be seen. Likewise, it remains to be seen whether its position will be protected in time of storm by future Federal legislation providing Federal mortgage foreclosure moratoria laws, new rescue operations, or the easing of debt reorganization or bankruptcy laws.

Federal National Mortgage Association

The National Housing Act of 1934[45] provided for the creation of national mortgage associations to be formed for the purpose of providing a market for mortgages insured under Title II (FHA insurance) of that Act.[46] The Federal National Mortgage Association is a national mortgage association formed entirely with RFC funds by the RFC under the provisions of this Act.[47]

Authority was granted to make real estate loans insurable by the FHA, to purchase, service or sell FHA insured mortgages or uninsured first mortgages up to 60% of valuation, and to borrow money through the issuance of its obligations.

Subsequent amendments gave authority to purchase and service the "GI" home loan mortgages guaranteed under the Servicemen's Readjustment Act of 1944, mortgages insured under the war housing insurance activity of the FHA, and mortgages insured under other related insurance activities of the FHA.[48]

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44. 6th Annual Report, Housing and Home Finance Agency, p. 216, states: "Insurance written by the FHA under all its programs from 1934 to the end of 1952 totaled well over $29 billion, covering 14.3 million property improvement loans and mortgages on 3.9 million dwelling units. The largest share of the total insurance written, $18.6 billion, represented mortgages on homes. Property improvement loans accounted for another $6.1 billion of the total, and rental and cooperative project mortgages for $4.4 billion." It also states, p. 209: "Of the aggregate insurance written, $15.9 billion was estimated to be outstanding as of December 31, 1952. As of the same date, losses on the total amount of mortgage insurance written amounted to 2/100 of 1 per cent."

45. Effective June 27, 1934, 48 Stat. 1246, 12 U. S. C. A. 1701, *et seq.*

46. 12 U. S. C. A. 1716. Under Reorganization Plan No. 22 of 1950, the FNMA was transferred from the RFC to the Housing and Home Finance Agency.

47. Colean, *American Housing, Problems and Prospects* (1944), p. 271.

48. 12 U. S. C. A. 1716(a) through (f).

Housing and Home Finance Agency

The Housing and Home Finance Agency was established by the President's Reorganization Plan 3 of 1947, effective July 27, 1947.[49] This agency was established to provide a single permanent agency responsible for the principal housing programs and functions of the Federal Government. By a process of evolution, it has come to consist of the Office of the Administrator (including the Federal National Mortgage Association), the Home Loan Bank Board, Federal Housing Administration, Public Housing Administration, and the National Housing Council.[50]

The United States Government Organization Manual of 1953-54 gives the following organization chart of the Housing and Home Finance Agency:[51]

49. 12 F. R. 4981, 61 Stat. 954, 5 U. S. C. A. 133 y-16, p. 112.
50. U. S. Govt. Organization Manual, 1953-54, p. 404.
51. P. 578.

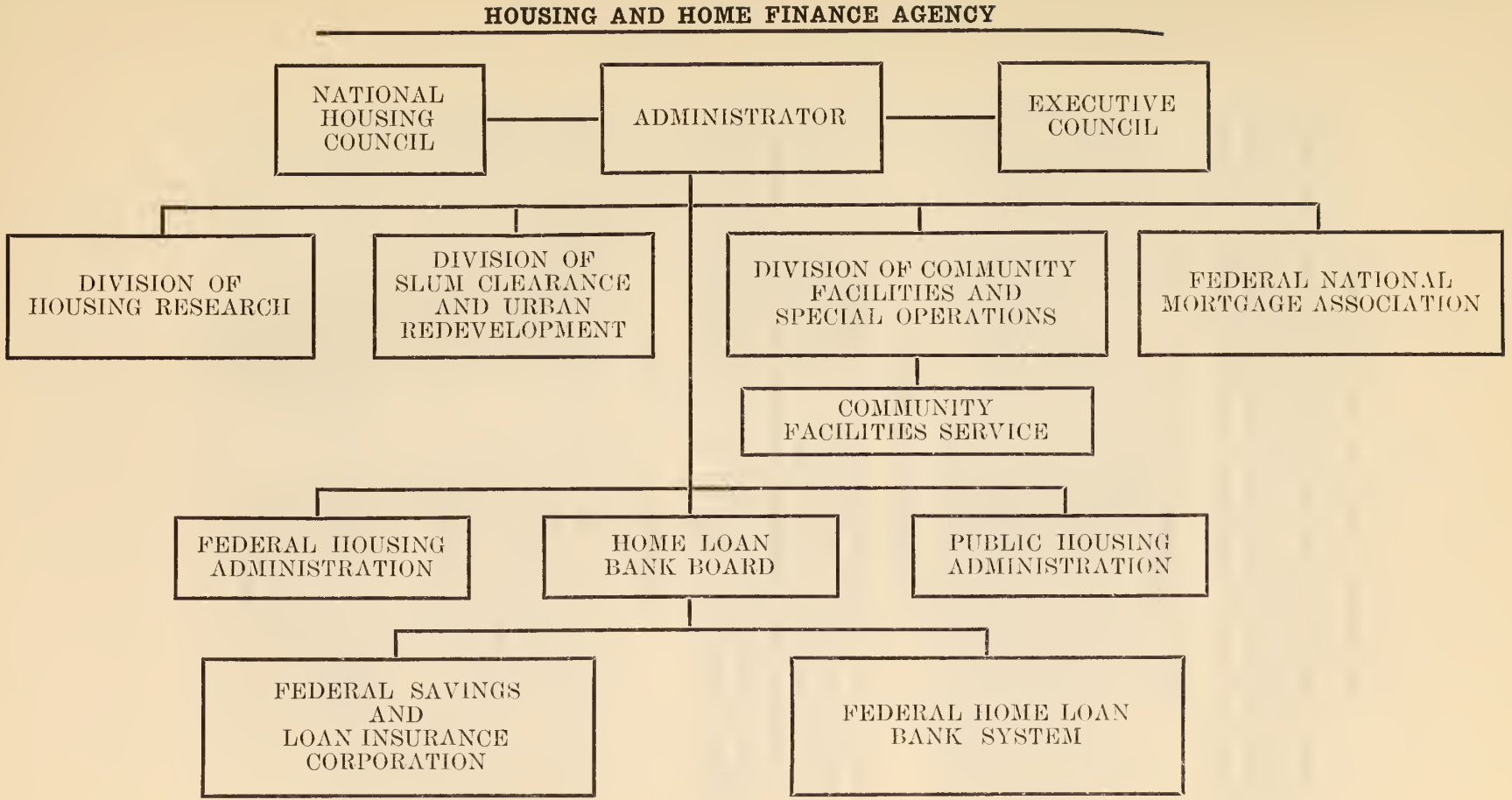
HOUSING AND HOME FINANCE AGENCY
NATIONAL HOUSING COUNCIL
ADMINISTRATOR
EXECUTIVE COUNCIL
DIVISION OF HOUSING RESEARCH
DIVISION OF SLUM CLEARANCE AND URBAN REDEVELOPMENT
DIVISION OF COMMUNITY FACILITIES AND SPECIAL OPERATIONS
FEDERAL NATIONAL MORTGAGE ASSOCIATION
COMMUNITY FACILITIES SERVICE
FEDERAL HOUSING ADMINISTRATION
HOME LOAN BANK BOARD
PUBLIC HOUSING ADMINISTRATION
FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION
FEDERAL HOME LOAN BANK SYSTEM

CHART 8

Servicemen's Readjustment Act of 1944.[52]

Among other things this Act provided for the guarantee by the Veterans' Administration of credit extended to veterans for the purchase, construction, and improvement of homes, and for other purposes by financial institutions, commonly called "GI loans."

Veterans' Emergency Housing Act of 1946.[53]

This Act was passed to encourage private construction of housing for rental or sale to veterans. It extended and liberalized the wartime insurance of mortgages by the FHA and authorized the Housing Expediter to direct the flow of building materials to veterans' housing and increase materials production through incentives and market guarantees. He also had power to regulate prices and rents on veterans' housing.

Housing Act of 1948.[54]

This Act revised the financing aids to encourage private housing construction at lower prices and rents. Prefabricated housing and cooperative projects were also assisted. Although it did not renew the emergency FHA mortgage insurance which had expired, it replaced it with a liberalized normal peacetime FHA mortgage insurance program which looked to long-term values and operations.

Housing Act of 1950.[55]

This Act provided very liberal FHA mortgage insurance terms for the lower-priced sale and rental housing. Conditions for the insurance of mortgages were liberalized and additional assistance was given to housing cooperatives. It expanded the home loan guarantee entitlement of World War II veterans and authorized direct loans to financially responsible veterans unable to obtain private credit under the Veterans' Administration guaranteed loan program.

The statute also provided for the disposition of war and veterans' emergency housing. A program of direct loans to colleges to provide for student and faculty housing was adopted.

52. Ch. 268, 58 Stat. 284, 38 U. S. C. A. 693, *et seq.*
53. Ch. 268, 60 Stat. 207, 12 U. S. C. A. 1738, *et seq.*
54. Ch. 832, 62 Stat. 1268, 12 U. S. C. A. 1701c, *et seq.*
55. Ch. 94, 64 Stat. 48, 12 U. S. C. A. 1701c, *et seq.*

Defense Production Act of 1950.[56]

The President was given broad powers to deal with effects of the defense economy upon housing construction. This resulted in restrictions on residential real estate credit by requiring larger down payments, and shorter term mortgages.

Defense Housing and Community Facilities and Services Act of 1951 [57]

This Act was passed to aid the mobilization program by assisting in the provision of housing and community facilities for civilian workers and military personnel engaged in defense activities. This was primarily accomplished by authorizing the insurance of mortgages on defense housing, direct provision of defense housing and community facilities and services and the provision of financial assistance to assure prefabricated housing production.

Housing Amendments of 1953 [58]

This Act continued existing programs due to expire, liberalized part of the FHA mortgage insurance program, made changes to encourage construction of more low-rent housing, authorized the FHA to repay the Treasury all moneys advanced to start the FHA insurance program, and dissolved the HOLC. It contained other technical changes.

II.

Public housing and slum clearance

Public housing, private housing, blighted areas, slum clearance, neighborhood redevelopment, relocation housing, Housing Acts, Land Clearance Commissions, Housing Authorities, all are subjects and nomenclature which have gained prominence and importance in urban areas in the last generation. Federal statutes, State statutes, Executive orders, local ordinances, a legion of administrative acts, and new kinds of cooperation among National, State and local bodies having jurisdiction of parts of the housing program,

56. Ch. 932, 64 Stat. 798, 50 U. S. C. A. App. 2061, *et seq.*

57. Ch. 378, 65 Stat. 293, 12 U. S. C. A. 1701a-1, *et seq.*

58. Chap. 170—Public Law 94. *U. S. Code Congressional and Administrative News*, No. 13, July 20, 1953, pp. 2173-2183.

all testify to the force of the pressures which result and the inevitability of public action when masses of people are involved in crises which affect the fundamentals of their living. Because of their inter-relation and the frequency with which the same statutes deal with segments of the two, slum clearance and public housing are herein discussed together.

It may be argued with some force that the public housing and slum clearance activity which has occurred in all major urban areas in depression and postdepression and war years primarily is due to revolutionary changes in social thinking and in the concept of Federal power which have taken place during that period. However, considering the predominantly urban characteristics of these activities, it seems fair to assume that the areas of public housing and slum clearance reflect one of the real influences of the metropolis, for essentially they spring from urban conditions and urban living.

In these fields in late years have occurred activities of tremendous magnitude.

Not long ago it would have been revolutionary to suggest that Federal or State Governments might spend taxes collected from the many to build dwellings for a few and permit those few to pay low rentals which result in further demands on tax funds to subsidize resulting operating losses. At present, the principles involved in such exertions of governmental power have been approved by both legislative and judicial branches of the Government, furnish an important tool for the executive, and are generally accepted by the public as an appropriate present-day recognition of existing social obligations.

A generation ago it also would have been unthinkable that a public body, at great public expense, might condemn large tracts of privately-owned realty, raze the improvements, reduce the area to raw land, and then sell the land to private interests to again be built upon, with the sale price producing only a fraction of the public moneys spent in consummating the operation. The traditional judicial view was that "The taking of one citizen's property for the purpose of improving it and selling or leasing it to another, or for the purpose of reducing unemployment is not * * * within the scope of the powers of the federal government."[59]

59. *United States* v. *Certain Lands in the City of Louisville* (1935). 78 Fed. 2d 684 at p. 688.

—Stated public policy

The philosophy which developed during the depression and war years is reflected by declarations of policy now found in that portion of the Federal statutes entitled: "The Public Health and Welfare."

In the Low-Rent Housing Act of 1937 [60] the Congress declared:

> "It is declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in urban and rural nonfarm areas, that are injurious to the health, safety, and morals of the citizens of the Nation. * * *
>
> "The term 'low-rent housing' means decent, safe, and sanitary dwellings within the financial reach of families of low income, and developed and administered to promote serviceability, efficiency, economy, and stability, and embraces all necessary appurtenances thereto."

As introductory to and an essential part of the Housing Act of 1949, there was enacted the following formal declaration of policy: [61]

> "The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation. * * * The policy to be followed * * * shall be: (1) private enterprise shall be encouraged to serve as large a part of the total need as it can;

60. 42 U. S. C. A. § 1401 and § 1402(1).
61. 42 U. S. C. A. § 1441.

(2) governmental assistance shall be utilized where feasible to enable private enterprise to serve more of the total need; (3) appropriate local public bodies shall be encouraged and assisted to undertake positive programs of encouraging and assisting the development of well-planned, integrated residential neighborhoods, the development and redevelopment of communities, and the production, at lower costs, of housing of sound standards of design, construction, livability, and size for adequate family life; (4) governmental assistance to eliminate substandard and other inadequate housing through the clearance of slums and blighted areas, * * *."

—Beginnings

World War I began the era of Federal participation in public housing. The first steps were tied to the war effort, were very modest, and gave no indication of what was to follow. Under the Department of Labor, plans for housing war workers were made by the United States Housing Corporation and the Division of Transportation and Housing of the Shipping Board Committee. Because of the quick termination of the war, only a relatively small number of houses were completed.

After the war, most of the dwellings were sold to individual buyers. Permanent Government assistance and a national housing program disappeared. The United States Housing Corporation was charged with liquidation of the Government's housing undertakings incident to mobilization. Housing was returned to the hands of private business until the depression.[62]

—Development

The Emergency Relief and Construction Act of 1932 was the first Federal measure giving direct aid for housing, except for the limited defense housing in World War I previously mentioned. The Reconstruction Finance Corporation was given power to make loans to State regulated limited dividend corporations formed to develop private housing under public supervision.[63]

The idea which eventually resulted in America's first permanent

62. Ebenstein, *The Law of Public Housing* (1940), p. 14.

63. Colean, *American Housing, Problems and Prospects* (1944), p. 276.

public housing program is found in the National Industrial Recovery Act of 1933,[64] which provided for the following:

> "* * * The Administrator, under the direction of the President, * * shall include among other things [in the Public Works' Program] the following: * * * (d) construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum clearance projects. * * *"

This was only a very small part of the entire Public Works' Program under the Recovery Act.

Pursuant to this there was formed the Housing Division of the Public Works' Administration. Its purpose was to relieve unemployment through the construction of socially useful housing.[65] In the beginning its policy was financial assistance to new housing construction in the form of loans to private limited dividend corporations under public control.

When this failed to produce the desired results, the Housing Division abandoned the limited dividend loan policy and undertook low-rent housing and slum clearance on its own responsibility.[66] This developed into a plan of direct financing of Government-owned housing[67] which continued until adverse decisions[68] in the lower courts on the Federal power to condemn land for housing and slum clearance purposes stimulated the organization of local public bodies to perform that task. These courts decided that the Federal Government's attempt to condemn private property for public housing and slum clearance was unconstitutional, since such a use was not a public use as applied to the Federal Government's power of eminent domain.[69]

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64. Title II, approved June 16, 1933, Chap. 90, 48 Stat. 195, 40 U. S. C. A. 401, *et seq.*

65. Miles Colean, *American Housing, Problems and Prospects* (1944), p. 276, points out the disadvantage of the "split purpose" viz. housing and depression cure. "The evolution of techniques for a new form of public enterprise required time. The exigencies of the depression demanded action. Between these two demands there was no satisfactory compromise."

66. Ebenstein, *The Law of Public Housing* (1940), p. 16. Seven out of 500 applications were approved at the end of 1933.

67. Colean, *American Housing, Problems and Prospects* (1944), p. 276.

68. *United States* v. *Certain Lands in City of Louisville* (1935), 78 Fed. 2d 684; see also *United States* v. *Certain Lands in the City of Detroit* (1935), 12 Fed. Supp. 345.

69. *United States* v. *Certain Lands in City of Louisville* (1935), 78 Fed. 2d 684, 688, Circuit Judge Moorman.

—Expansion of the definition of "public use"

Because the results of these decisions shifted the burden of public housing and slum clearance to the local public agencies, the question of "public use" confronted the high courts of the states. It was clear that for the program to survive, the traditional concepts of "public use" had to be expanded. The state courts did not fail to do the necessary expanding.

The transition which took place was well stated by the Supreme Court of Minnesota. It said:

> " 'The notion of what is public use changes from time to time. Public use expands with the new needs created by the advance of civilization and the modern tendency of the people to crowd into large cities. Such a taking as here proposed could not possibly have been thought a taking for public use at the time of the adoption of our Constitution when the state was practically a wilderness without a single city worthy of the name. "The term 'public use' is flexible and cannot be limited to the public use known at the time of the forming of the Constitution." *Stewart* v. *Great Northern Ry. Co.*, 65 Minn. 515, 68 N. W. 208, 33 L. R. A. 427. What constitutes a public use at the time it is sought to exercise the power of eminent domain is the test. The Constitution is as it was when adopted; but, when it employs terms which change in definition as conditions change, it refers to them in the sense in which they are meant when the protection of the Constitution is sought. * * *' "[70]

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70. *Thomas* v. *Housing and Redevelopment Authority* (1951), 234 Minn. 221, 48 N. W. 2d 175, 186, 188.

In *McLaughlin* v. *Housing Authority of City of Las Vegas* (1951), 68 Nev. 84, 227 Pac. 2d 206, 210, 211, the Supreme Court of Nevada held: "The issue of fundamental importance 'upon the determination of which several of the lesser and incidental issues will turn, is whether slum clearance and public housing projects for low-income families are public uses and purposes for which public money may be expended and private property acquired.' *Housing Authority of County of Los Angeles* v. *Dockweiler*, 14 Cal. 2d 437, 94 P. 2d 794, 801. * * * The cases are virtually unanimous as to the public, municipal, governmental nature of the Housing Authority created by the act and as to the public purpose which is its objective. The point need not be labored further."

Opinion to the Governor (1949), 76 R. I. 249, 69 Atl. 2d 531, 536: "* * * It is our judgment, therefore, that the assembly of property in a blighted area and the elimination therefrom of unsafe, insanitary and dilapidated structures in the manner and to the extent prescribed in the act as herein construed are legitimate objects for the exercise of the police power by the legislature and that the grant thereunder of the right of eminent domain to an agency as defined in this act violates no constitutional provision."

The Supreme Court of Pennsylvania arrived at the same conclusion. It said:

> "In *Dornan* v. *Philadelphia Housing Authority*, 331 Pa. 209, 221, 200 A. 834, 840, it was pointed out that 'views as to what constitutes a public use necessarily vary with changing conceptions of the scope and functions of government, so that today there are familiar examples of such use which formerly would not have been so considered. As governmental activities increase with the growing complexity and integration of society, the concept of "public use" naturally expands in proportion.' It is no constitutional objection to the statute, nor does it derogate from the public character of its objective, that the Authority will to some extent conduct what may heretofore have been regarded as a private enterprise; to hold otherwise would mean that the State would be powerless, within constitutional limitations, to act in order to preserve the health and safety of its people even though such action were imperative and vital for the purpose."[71]

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71. *McSorley* v. *Fitzgerald* (1948), 359 Pa. 264, 59 A. 2d 142, 145, 146. See also *Schenck* v. *City of Pittsburgh* (1950), 364 Pa. 31, 70 A. 2d 612 (Urban redevelopment); *McLean* v. *City of Boston* (1951), 327 Mass. 118, 97 N. E. 2d 542 (Relocation of buildings—residences); and *Belovsky* v. *Redevelopment Authority* (1947), 357 Pa. 329, 54 A. 2d 277, 282 (Urban redevelopment), in which the court said: "In the case of the Urban Redevelopment Law the operation of clearing and rehabilitating the 'slums,' now called 'blighted areas', is not to be followed by a continuing ownership of properties by the Redevelopment Authorities for any such further and ulterior social-welfare purpose as that of providing low rental homes for persons in moderate circumstances. In this additional feature of the Housing Authorities Law there was implicit the modern recognition of an enlarged social function of government which called for an advance over previous legal conceptions of what constitutes a public use justifying the exercise of the power of eminent domain, but this court sustained the constitutionality of that act, and the courts of numerous other States have, without exception, upheld similar legislation. In the case of the Urban Redevelopment Law, therefore, the justification of the grant of the power of eminent domain is even clearer than in the case of the Housing Authorities Law, there being in the present act only the one major purpose of the elimination and rehabilitation of the blighted sections of our municipalities, and that purpose certainly falls within *any* conception of 'public use' for nothing can be more beneficial to the community as a whole than the clearance and reconstruction of those sub-standard areas which are characterized by the evils described in the Urban Redevelopment Law. It has long been clear that those evils cannot be eradicated merely by such measures, however admirable in themselves, as tenement-house laws, zoning laws and building codes and regulations; these deal only with future construction, not with presently existing conditions. Nor, as experience has shown, is private enterprise adequate for the purpose. The legislature has therefore concluded —and the wisdom of its conclusion is for it alone—that public aid must accompany private initiative if the desired results are to be obtained. The great cities of Europe have been improved and largely rebuilt through the

—Public use and private gain

In an effective and much quoted opinion, the Supreme Court of Illinois gave a clear reflection of the change which has taken place in modern judicial thought concerning the propriety of actions deemed to be for the public welfare. In doing so, it frankly came to grips with the question of whether the basic concept of public use is destroyed by the circumstance that after the public use has been accomplished the property involved in slum clearance efforts again would find its way into private hands. It said:

> "The legislature has definitely determined that the prevalence of the conditions enumerated in section 2 are conducive to ill-health, the transmission of disease, infant mortality, juvenile delinquency, crime and poverty. It has further declared that the elimination of the conditions set forth in section 2 of the act is in the best interest of the health, morals, safety and general welfare of the citizens of the State. In view of this legislative declaration, the court cannot say that the finding of the legislature that the elimination and redevelopment of slum and blight areas is a public purpose is unwarranted, or that the use to be made of the property is not a public use and a public purpose. The taking of property for the purpose of the elimination, redevelopment and rebuilding of slum and blight areas, meets all the requirements of a public use and public purposes within the principles of the law of eminent domain.
>
> "The fact that the continued use of the property for public purposes, after the elimination of slum and blight areas and the redevelopment of such areas has been achieved, is only partially assured and safeguarded by the act, is wholly immaterial. When such areas have been reclaimed and the redevelopment achieved, the public purpose has been fully accomplished. The fact that the act does not thereafter vouchsafe the continued use of the property acquired for public pur-

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expenditure of public moneys by the edicts of monarchs and dictators; if the governing bodies in our own democratic Commonwealth are to be held unable, under our constitution, to plan and support such reconstruction projects, our cities must continue to be marred by areas which are focal centers of disease, constitute pernicious environments for the young, and, while contributing little to the tax income of the municipality, consume an excessive proportion of its revenues because of the extra services required for police, fire and other forms of protection."

poses, does not in any way affect the purposes of the act or render the taking of the property a taking for a use or purpose which is not public. The achievement of the redevelopment of slum and blight areas, as defined in the act, in our opinion constitutes a public use and a public purpose, regardless of the use which may be made of the property after the redevelopment has been achieved." [72]

To the same effect the Supreme Court of Virginia held that:

"The fact that property acquired to serve the public may also incidentally benefit some private individuals does not destroy the public character of the use." [73]

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72. *Zurn* v. *City of Chicago* (1945), 389 Ill. 114, 128, 129, 59 N. E. 2d 18. See also *People ex rel. Tuohy* v. *City of Chicago* (1946), 394 Ill. 477, 68 N. E. 2d 761; *General Development Corp.* v. *City of Detroit* (1948), 322 Mich. 495, 33 N. W. 2d 919; *In re Brewster Street Housing Site*, 291 Mich. 313, 289 N. W. 493; and *In re Jeffries Homes Housing Project*, 306 Mich. 638, 11 N. W. 2d 272.

In *Opinion of the Justices* (1947), 321 Mass. 759, 73 N. E. 2d 881, 890, it was said: "Since the purpose is public, it justifies the exercise of the power of eminent domain by the General Court as well as the expenditure of money raised by taxation. Opinion of the Justices, 297 Mass. 567, 571, 8 N. E. 2d 753. While land cannot ordinarily be taken by eminent domain for the purpose of renting and sale (*Salisbury Land & Improvement Co.* v. *Commonwealth*, 215 Mass. 371, 376, 102 N. E. 619, 46 L. R. A., N. S., 1196), this principle is inapplicable where, as here, the property so rented or sold is thereby devoted to a public purpose. And provisions for renting or selling property no longer needed for the purpose for which it was taken do not invalidate the taking."

73. *City of Richmond* v. *Dervishian* (1950), 190 Va. 398, 57 S. E. 2d 120, 124.

In *Chicago Land Clearance Commission* v. *White* (1952), 411 Ill. 310, 104 N. E. 2d 236, 239, the court said: "In appellant's brief is found the false major premise that the present proceeding is for the sole purpose of acquiring property for the New York Life Insurance Company. Each petition herein seeks to acquire the property in the slum and blighted area so that the slum may be cleared. The New York Life Insurance Company does not appear in any of the petitions. Appellee admits, however, that it is a fact that the commission has entered into a contract for the sale to the New York Life Insurance Company of a portion of the property in the area where the buildings have been removed. This contract was entered into pursuant to the provisions of the statute. The controlling motive, however, for the present condemnation is to clear from the area in question the moral and physical blight which slum and congestion has created. The subsequent development of the property by the New York Life Insurance Company does not mean that the taking is for a private purpose. Consequently, the many authorities cited in appellants' brief to the effect that private property cannot be condemned for private use are not applicable to the present situation. Quite appropriate is this statement appearing in the Zurn case, 389 Ill. at page 129, 59 N. E. 2d at page 25: 'the redevelopment of slum and blight areas. * * * constitutes a public use and a public purpose, regardless of the use which may be made of the property after the redevelopment has been achieved.'"

—**United States Housing Act of 1937** [74]

The principles of public housing which had been developing since the beginning of the depression finally culminated in the United States Housing Act of 1937. It was the first low-rent public housing program in the history of the nation. The Act also provided for slum clearance as a related task to the public housing program.

Its basis. The public housing policy of the United States adopted in the 1937 Act was based upon the fundamental of utilizing Federal funds and credit to assist local public housing agencies.[75] Its legal justification was the promotion of the general welfare.

Methods. The Act created the United States Housing Authority under the direction of an Administrator and provided for 60-year, interest bearing loans to public housing agencies to aid in their low-rent housing or slum clearance projects up to 90% of their costs. Annual contributions were also authorized to help maintain the low-rent character of the projects. These Federal contributions were made conditional upon contributions in the form of cash or tax exemptions by the local political subdivisions in which the projects are located, and upon substantial equivalent elimination of substandard housing whenever a project is undertaken, unless a housing shortage should make that course impractical.

As an alternative method of assistance, provision was made for capital grants which also were made conditional upon equivalent elimination and contributions by the local political subdivision.

Financing. The Authority was provided with a capital stock of $1,000,000, subscribed for by the United States and paid for by the Secretary of the Treasury. Funds available under Acts of Congress for housing or slum clearance could be allocated for the purposes of the Act. The Authority was also given power to issue bonds or notes to obtain operating funds.

Public housing and slum clearance activities were carried on under the 1937 Act. That Act resulted in the provision of financial assistance to local public agencies for the construction of many new

74. Approved September 1, 1937, Ch. 896, Section 30, 50 Stat. 899; 42 U. S. C. A. 1401-1430.

75. The text of the carefully stated national policy then adopted is hereinbefore set forth; see note 60, *ante*.

dwellings for people who had been living in slums. The Act also resulted in the elimination of a great many unsafe and insanitary dwellings under the equivalent elimination provisions. However, upon the theory that "a comprehensive attack upon the slum problem must be broader than was possible under a public housing program alone" the Housing Act of 1949[76] was adopted. There was a major difference between the 1937 and the 1949 Acts in that under the latter public housing with its equivalent elimination, instead of being the only means of slum clearance, "becomes one of the various instruments in the broader attack on slums and blight."[77]

—Housing Act of 1949

Its purpose. The Housing Act of 1949[78] fixed a "goal of a decent home and a suitable living environment for every American family."[79] The now well-known objectives of increased housing production, community development, clearance of slums and blighted areas, and low-rent public housing were coordinated and amplified by the adoption of a policy to utilize both private enterprise and governmental assistance to achieve this goal.[80]

Methods. To assist communities in eliminating their slums and to aid redevelopment of blighted areas by private enterprise, the Act authorized loans and grants to local public agencies for the purpose of assembly, clearance, preparation and sale of land for redevelopment.[81]

Financing. To obtain funds for these loans, the Administrator was given power to issue notes and obligations for purchase by the Secretary of the Treasury. Capital grants were authorized to help meet the loss connected with slum clearance.[82] The net project

76. *The Relationship Between Slum Clearance & Urban Redevelopment and Low-Rent Public Housing*, Housing and Home Finance Agency (1950), pp. 5-6.

77. *Ibid.*, p. 10.

78. 63 Stat. 413; 42 U. S. C. A. 1401 *et seq.*

79. See note 61, *ante.*

80. The statutory statement of policy is hereinbefore set forth. See note 61, *ante.*

81. Over a five-year period, $1,000,000,000 in loans is authorized. The loans can be used for planning a project, acquisition and clearance of land, and its preparation for reuse. The loans are repaid when the land is sold or leased for redevelopment.

82. Over a five-year period, $500,000,000 in capital grants is authorized.

cost was to be shared two-thirds by the Federal Government and one-third by the local governments.[83]

Policies. The Act also contemplated local approval of projects and a relocation plan for the people displaced from project areas. These were given a preference for public housing. The Act also authorized Federal contributions and loans for additional units of low-rent public housing to be paid over a fixed period to maintain the low-rent character of the projects. It also embodied the principles of substantial equivalent elimination, preferences for displaced families and veterans, and a real and personal property tax exemption or payment in lieu of taxes. Capital grants were authorized to assure the low-rent character of projects.

Provision was made for local determination of the need for low-rent housing but subject to the condition that the public housing agency must fix upper rental limits at least 20% below the lowest rents asked by private enterprise.

The Act also sought to encourage private capital to help finance projects by purchasing bonds and obligations of housing agencies and provided for a comprehensive program of research and study to explore the problems of housing.

Up to the present time, the Federal activities in public housing and slum clearance have been carried on under the statutes previously discussed. The 1949 Act does provide, however, for variations by the President in the extent of operation.

—Public Housing Administration[84]

Creation. The Public Housing Administration is a constituent agency of the Housing and Home Finance Agency.[85] The Public Housing Administration is headed by a Public Housing Commissioner appointed by the President by and with the advice and consent of the Senate. It is a successor agency to the United States Housing Authority, which was created by the United States Housing Act of 1937[86] to administer the low-rent public housing program established by that Act. In 1942, the responsibilities of the United States Housing Authority were taken over by a newly created

83. The local agencies' share may be in the form of cash or provision of public facilities required for the new land use.

84. U. S. Govt. Organization Manual, 1953-54, pp. 413, 414.

85. President's Reorganization Plan 3 of 1947, effective July 27, 1947.

86. 50 Stat. 888; 42 U. S. C. A. 1430.

Federal Public Housing Authority which continued in existence until 1947 when Public Housing Administration was established.

Programs. The Public Housing Administration administers two major programs. One is a low-rent public housing program, which is a direct responsibility of the Public Housing Commissioner. The other, a public war housing program, is a responsibility delegated to the Public Housing Commissioner by the Housing and Home Finance Administrator.

Low-rent public housing. The low-rent public housing program was originally authorized by the United States Housing Act of 1937, which authorized Federal financial assistance to local communities "to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income * * *."[87] Also included in this program are certain projects not constructed under the Housing Act of 1937, as amended, but subsequently transferred to the low-rent public housing program: projects developed by the Public Works Administration before the passage of the Act, and Farm Labor Camps and permanent war housing projects transferred under the terms of the Housing Act of 1950.[88]

Public war housing. The other principal program administered by Public Housing Administration is the public war housing program, which originally consisted of permanent and temporary housing accommodations built under the terms of the Lanham Act[89] to provide housing for war workers and military personnel during World War II. Also included in this program are projects developed under Title III of the Defense Housing and Community Facilities and Services Act of 1951.[90] This Title provided temporary or mobile housing for migrant defense workers and military personnel required in connection with national defense activities in critical defense housing areas. Public Housing Administration is responsible for the management of the housing included in this program, either by direct operation or through local agencies, and for the orderly disposition of such housing under the terms of the Housing Act of 1950.

87. See note 60, *ante*. This law was amended by the Housing Act of 1949 (63 Stat. 413; 42 U. S. C. A. 1401) to perfect its details and to increase the amount of Federal assistance available.

88. 64 Stat. 73; 42 U. S. C. A. 1412.

89. 54 Stat. 1125; 42 U. S. C. A. 1521-1590.

90. 65 Stat. 293; 42 U. S. C. A. 1591.

Volume of public housing. It is difficult to determine accurately and as of any given date the aggregate amount of activity which has occurred in the field of public housing. The reports of official local agencies engaged in these activities[91] contain a great amount of detail concerning projects in various stages between planning and completion. A study of those reports, and a rearrangement and tabulation of the statistics found in them, indicates activities of substantial character. According to those figures, as of the date of the preparation of this paper, the Public Housing Administration had under its control or supervision a total of 3,140 projects containing 736,314 dwelling units. The great majority of these projects result primarily from the activities of local housing authorities operating under the supervision of the Public Housing Administration. Others result from the direct activities of the Public Housing Administration, the activities of cities, states, universities and others.[92]

In addition to housing projects under the control or supervision of the Public Housing Administration, many activities in this field occur under city or other local auspices. When these local activities, not under the control or supervision of the Public Housing Administration, are added to the projects which are under the control or supervision of the Public Housing Administration, the totals involved become somewhat larger. As of October 1953 those totals, including projects and units in existence, in construction, in planning and in the preplanning stages, would aggregate 3,224 projects and 844,773 dwelling units.[93]

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91. Compiled and published by the National Association of Housing Officials under the title of *1952-1953 Housing and Redevelopment Directory.*

92. See following page for this footnote.

93. A breakdown of these totals discloses the following:

(a) Low-rent permanent housing owned by the Federal Government, built by the PWA Housing Division under the Emergency Relief and National Industrial Recovery Acts and leased to local authorities:

Projects—41 Units—19,183

[See chart under note 92 for PWA projects directly operated by PHA.]

(b) Low-rent permanent housing built by local housing authorities with Federal aid under the United States Housing Act of 1937:

Projects—555 Units—170,192

(c) Low-rent permanent housing built by local housing authorities with Federal aid under the Housing Act of 1949:

	Projects	Units
Under management	247	29,769
Under construction	606	103,447
In planning stage	522	93,543

[92]A compilation of the latest published figures arranged both as to projects and dwelling units contained in the projects produces the following totals:

HOUSING PROJECTS UNDER THE CONTROL OR SUPERVISION OF THE PUBLIC HOUSING ADMINISTRATION

Field Office and Management Agency	Total	Subsistence Homesteads and Greenbelt Towns	USHA					War Housing		Defense Housing	Veterans' Reuse Housing
			Urban		Rural	PWA	Farm Labor Camps	Permanent	Temporary		
			Active	Deferred	Active						
Total	3,140	7	1,589	23	143	50	39	368	690	27	204
Local Housing Authorities	2,617	—	1,589	23	143	45	38	250	446	—	83
Direct PHA	382	7	—	—	—	5	1	116	224	27	2
Cities and States	70	—	—	—	—	—	—	—	—	—	70
Universities	33	—	—	—	—	—	—	—	1	—	32
Other	38	—	—	—	—	—	—	2	19	—	17

DWELLING UNITS UNDER THE CONTROL OR SUPERVISION OF THE PUBLIC HOUSING ADMINISTRATION

Total	736,314	1,568	372,271	2,287	7,587	21,640	9,360	116,799	169,691	4,469	30,642
Local Housing Authorities	613,789	—	372,271	2,287	7,587	19,803	9,214	68,329	119,535	—	14,763
Direct PHA	106,122	1,568	—	—	—	1,837	146	47,733	48,689	4,469	1,680
Cities and States	6,933	—	—	—	—	—	—	—	—	—	6,933
Universities	5,362	—	—	—	—	—	—	—	98	—	5,264
Other	4,108	—	—	—	—	—	—	737	1,369	—	2,002

III.

Provision of housing during wartime

With the beginning of the defense program in 1940, dwellings for workers in the war industries of the cities were provided through action of the Federal Government. This was accomplished gen-

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(d) Low-rent housing to be built under the Housing Act of 1949, by local housing authorities which has been approved for preliminary loans but is not yet in the planning stage:

Units—70,012

(e) Low-rent housing to be built under the Housing Act of 1949, by local housing authorities which has received program reservations from the PHA but has not received approval for preliminary loans and is not in the planning stage:

Units—26,741

(f) Permanent family dwellings owned by the Federal Government, built for war workers under the Lanham Act and operated by local housing authorities (only those in active use):

Projects—212 Units—66,130

(g) Temporary dwellings owned by the Federal Government, built under the Lanham Act and leased to local authorities for operation (includes only those in use on their wartime sites):

Projects—334 Units—110,133

(h) Temporary housing for World War II veterans, managed by cities, local housing authorities, or educational institutions, for which net rental revenues go to the PHA (consists mostly of surplus temporary dwellings moved under the Lanham Act):

Projects—98 Units—15,301

(i) Temporary housing similar to that in (h) above, where ownership has been transferred to a local governing body:

Projects—240 Units—32,991

(j) Low- and moderate-rental housing financed in part by State funds. (These are built, owned and operated by the municipality with some form of State aid):

	Projects	Units
Under management	236	51,234
Under construction	28	4,007
In planning stage	36	21,154

(k) State-aided temporary housing. (Built in Connecticut, Illinois and New Jersey. It does not include categories (h) and (i) above):

Projects—18 Units—2,162

(l) Low- and moderate-rental permanent housing financed entirely out of City funds without State or Federal aid:

Projects—32 Units—25,379

(m) Low- and moderate-rental permanent housing financed with both City and State funds:

Projects—11 Units—2,144

(n) Temporary housing primarily for veterans financed entirely with City funds:

Projects—8 Units—1,251

erally by providing direct appropriations and through contracts let by Federal agencies.[94]

In June 1940, the United States Housing Authority was given the power to contract directly for defense housing. The Army and Navy Departments were also given funds to build dwellings.[95]

The major statute of the period which authorized direct Federal operations was the Lanham Act.[96] It was passed to provide housing for people working in national defense activities in areas where the President determined an acute housing shortage existed which would impede the national defense and not be relieved by private capital.

Under it the Federal Works Administrator was given power to acquire land by purchase, donation, or condemnation, and by contract, to make surveys and investigations, plan, design, and construct housing and the necessary facilities.

The cost of a dwelling was limited and if the Administrator decided there would be no chance of disposing of the houses after the emergency, he was directed to build temporary units.

Under another statute of the period the Defense Homes Corporation was formed as a means of stimulating housebuilding in defense areas by combining public and private effort. The corporation was incorporated pursuant to the President's letter to the Secretary of the Treasury on October 18, 1940. The President made funds available to the Reconstruction Finance Corporation which organized the Corporation, for the purpose of subscribing to equities in new rental units to be located in defense areas. This fund could also be used for mortgage financing.

It was intended to encourage private subscriptions to the fund but the Corporation decided to retain complete control. This resulted in the production of dwellings wholly owned and operated by the Government.[97]

High wages in defense areas stimulated a demand for houses to be purchased but many would-be purchasers lacked the required down payment. The Federal Housing Administration legislation was amended to provide for an insurance fund for special operation in

94. Colean, *American Housing, Problems and Prospects* (1944), p. 285.

95. *Ibid.*, p. 286.

96. Approved October 14, 1940. 54 Stat. 1125; 42 U. S. C. A. 1521, *et seq.*

97. Colean, *American Housing Problems and Prospects* (1944), pp. 286-287.

defense areas. This enlarged the mortgage insurance authority for the purpose of protecting builders and home financing institutions against wartime risks.[98]

In 1942, an additional amendment gave the Federal Housing Administration power to insure mortgages on large scale rental projects for war workers.[99]

By the early part of 1942, there were 16 major agencies operating in the field of defense housing. To coordinate the task, a complete reorganization of the 16 agencies was effected by Executive Order 9070 of February 24, 1942.[100] The United States Housing Authority was transferred to a new National Housing Agency which had three subdivisions: (1) Federal Home Loan Bank Administration, (2) Federal Housing Administration, and (3) the Federal Public Housing Authority.[101]

An important feature of the war and defense housing was its light construction, simple materials and reduced standards. The prefabrication of houses also became a factor in this era.[102]

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98. *Ibid.*, pp. 287-288.

99. *Ibid.*, p. 288.

100. "The need of using every possible sort of aid in one combined effort accentuated the weaknesses, lack of coordination, and personal jealousies arising from the existence of several independent or quasi-independent federal agencies." Colean, *American Housing. Problems and Prospects*, (1944), p. 288.

101. The USHA handled about ¼ of all activity by 1941, the remaining ¾ was carried on by other agencies, viz., Army, Navy, Division of Defense Housing of Federal Housing Authority, Public Buildings Administrator and the Defense Homes Corporation, among others.

The reorganization had the following effect: (a) The Federal Home Loan Bank Administration functioned in connection with financing home ownership and construction, formerly vested in the Federal Home Loan Bank Board, The Federal Home Loan Bank System, The Federal Savings and Loan Insurance Corporation, the HOLC and the U. S. Housing Corporation (created in World War I).

(b) The FHA continued its usual operations.

(c) The Federal Public Housing Authority combined the agencies building houses with public money. It took over the functions of the United States Housing Authority, Defense Homes Corporation, the nonfarm public housing, from the Farm Security Administrator, and the defense public housing except on Army and Navy reservations (such as heretofore had been divided among the Federal Works Agency, the USHA, the Public Buildings Administration, the Division of Defense Housing, the Mutual Ownership Defense Housing Division, the War Department, the Navy Department and the Farm Security Administration). The United States Housing Authority then became part of the Federal Public Housing Authority. Weintraub and Tough, "Federal Housing and World War II," *18 Journal of Land and Public Utility Economics*, pp. 155, 158.

102. Colean, *American Housing, Problems and Prospects*, (1944), p. 286.

In some areas the problems of slum clearance were abandoned because of the war housing needs.[103]

IV.

Temporary alleviation of housing shortages

Following the war there was a housing shortage. The causes of this shortage were many and varied. They included low building rate during the depression, building restrictions during the war, an increasing wartime marriage rate, rapid demobilization, migration of war workers and a high level of savings and economic activity. By the end of 1945 the housing problem was considered a major crisis. [104]

The highly urban character of the problem was apparent. It was stated that: "Contrary to the expectation of many analysts, the end of the war did not bring about a reversal of the migration trends experienced during the war. The one-time war workers and their families had become adjusted to urban living and showed no desire to go back to where they came from just because the war was over."[105]

The Lanham Act, which was "the basic wartime public housing act," was extended in December of 1945 to provide veterans with

103. "At present, in deference to war needs, new programs for slum clearance are at a standstill, but the agency which had been primarily sponsoring them, *i. e.*, the United States Housing Authority, has been active in the building of public housing for war workers." Weintraub and Tough, "Federal Housing and World War II," *18 Journal of Land and Public Utility Economics*, p. 155.

104. *Construction and Housing* (1946-47), Bulletin No. 941, U. S. Department of Labor, Bureau of Labor Statistics, pp. 18, 19. See also Hauser and Jaffe, "The Extent of the Housing Shortage," *Law and Contemporary Problems*, Vol. XII (1947), p. 3: "War has always left in its wake grave problems of economic and social adjustment. World War II required an unprecedented mobilization of the nation's human and material resources to meet the total war effort of our enemies and has left unprecedented problems of economic and social reconversion. Among the most acute of these problems is that relating to housing.

"The acute housing problem which faces us today, however, is more than a heritage of the war alone. It is also, in part, a product of the great dislocation resulting from almost a decade of depression which preceded the war. The cumulative effect of these catastrophic forces is evident in the extent of the current housing shortage."

105. *The Housing Situation—The Factual Background* (June 1949), Housing and Home Finance Agency, p. 17.

temporary housing using such wartime structures as barracks and other similar units.[106]

The Housing Act of 1950[107] included provisions for direct loans to institutions of higher learning to finance student and faculty housing.

These were the basic "stopgap" measures taken after the war while the postwar principles of Federal assistance were being developed.

V.

Rent control

One aspect of regulation which affected the maximum number of city dwellers and which demonstrates clearly the influence of the metropolis upon the rules and concepts relating to property is found in rent control.

The problems of rent control are urban in character and have been since its origin. However, the regulation of the relationship between landlord and tenant through rent controls is not a new concept. It dates back hundreds of years and is usually characterized by some calamitous event.[108] In the United States, rent control arrived late. During World War I there was no Federal regulation of rents, al-

106. *A Summary of the Evolution of Housing Activities in the Federal Government—Housing and Home Finance Agency* (1950), pp. 10, 11: "Altogether, more than 260,000 accommodations were provided under this program."

107. Public Law 475, 64 Stat. 48.

108. Willis, *A Short History of Rent Control Laws*, 36 Cornell Law Quarterly 54, pp. 54-67, states that in Rome as early as 1549, a papal decree prohibited rental increases and dealt with evictions. In 1555 a papal bull prohibiting the Roman Jews from owning real property or living among the Christians caused the formation of the ghetto. Because these areas were owned by Christian landlords, rents were greatly increased. Measures in the form of rent control were taken by papal bull in 1562 to help these Jews and were repeated in substance down to 1604.

In France, rent troubles arose at the time of the Ligue (1592), the Plague (1619) and the Fronde (1652) because the paralysis of commerce and industry by war, revolt or pestilence made it impossible for tenants to pay their rents. In the year 1592 the Parliament of Paris decreed a reduction of rents. During the Plague in 1619 there was no general reduction of rents, but individual cases were granted relief on principles of equity. This method has much in common with the new Illinois law adopted April 27, 1953, Ill. Rev. Stat. Chap. 57, § 17.1, which permits the court to stay evictions at its own discretion. During the revolt in 1649 which extended to 1652, Parliament granted additional relief. Emergency measures were also taken during the Franco-Prussian War (1870-1871).

In Spain a permanent commission was established in 1601 which had the power to control rents. Controls lasted until 1842. On December 3, 1755 in Portugal, the king ordered rents frozen because of the housing shortage created by the Lisbon earthquake which destroyed a large part of the city.

though a few bills were introduced in Congress in 1918 which never were acted upon. Most of what control there was resulted from the voluntary formation of "Fair Rent" committees whose results depended solely on public opinion. These committees were set up in some 82 cities and in other cities many of the existing agencies handled the task.[109] Just after World War I, legislation was enacted in New York and Washington, D. C., but it expired in the late 1920's.[110]

During the depression and the period leading up to World War II, there was little activity in the rent control field in the United States.[111] In 1941, some pressure developed for controls in defense areas. The National Defense Advisory Commission made a study of the situation but "did not recommend a general policy of rent control." In fact it stated that rent control was primarily a local matter for the states and municipalities. As a result, the Government helped organize "Fair Rent" committees. In a short time, however, they were considered inadequate and Federal regulation was requested.[112]

—Federal activity

Federal rent control became a reality in the Emergency Price Control Act of 1942.[113] Eventually, most of the urban areas of the country were placed under control.[114] The stated purposes of the Act reflected its wartime character:

> "It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents * * *."[115]

An Administrator was given power to recommend controls for a defense area and if nothing was done within 60 days, he could

109. *Ibid.*, p. 69.

110. *Ibid.*, pp. 70-75.

111. *Ibid.*, p. 77.

112. *Ibid.*, pp. 78-79.

113. Public Law 421, 77th Congress, 2d Session (Jan. 30, 1942), 56 Stat. 23; 50 U. S. C. A. App. §§ 901-946.

114. Willis, *op. cit.*, p. 79—"Federal regulation became an actuality in July, 1942 and spread rapidly * * * By January, 1945, Scranton, Pennsylvania, was the only city of more than 100,000 population not under control, and there were only six cities of more than 50,000 population; as of March 31, 1945, areas with a population (1940 census) of 93,000,000 were under control."

115. 50 U. S. C. A. App., § 901.

establish the necessary regulation. He was directed to use the rent levels in existence on or about April 1, 1941, as a standard from which to make adjustments. The Administrator also was directed to consider the recommendations of state and local officials concerned with local conditions relating to housing or rental conditions in defense-rental areas.[116] Evictions also were regulated by the Act in that a tenant could not be evicted for his compliance with the Act.[117] There was set up an Office of Price Administration under a Price Administrator.[118] Title II of the Act provided the rules for administration and enforcement.[119]

The Administrator designated hundreds of defense-rental areas, and promulgated regulations establishing maximum rents and restrictions on evictions in such areas. He also provided procedural regulations.[120] One of the peculiar characteristics of this method of control was that most of the rules setting forth the rights and duties of landlord and tenant were contained in the complex regulations rather than the Act itself.[121] Thus, the Administrator had a great deal of discretion in carrying out the purposes of the Act. This discretion was sustained by the United States Supreme Court in a case which generally held rent control under the Emergency Price Control Act of 1942 constitutional.[122]

The Act, which was due to expire on June 30, 1943, was extended many times, and finally expired on June 30, 1947.[123] This was not the end of the Federal controls, however, because the Housing and Rent Act of 1947[124] continued rent control.

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116. *Ibid.*, § 902.

117. *Ibid.*, § 904.

118. *Ibid.*, § 921.

119. *Ibid.*, §§ 921-926.

120. Freidlander and Curreri, *Rent Control* (New York—1948), p. 20.

121. *Ibid.*, p. 23.

122. *Bowles* v. *Willingham* (1944). 321 U. S. 503.

123. (a) Extended to June 30, 1944 by Stabilization Act of 1942 (56 Stat. 765).
(b) Extended to June 30, 1945 by Stabilization Extension Act of 1944 (58 Stat. 632).
(c) Extended to June 30, 1946 by Public Law 108, 79th Congress, 1st Sess., June 30, 1945 (59 Stat. 306).
(d) It expired on June 30, 1946 but the Price Control Extension Act of 1946 (60 Stat. 664) *effective July 25, 1946*, extended it to June 30, 1947. This resulted in a brief period when there were no Federal rent controls.

124. Public Law 129, 80th Congress, 1st Sess., § 201 (b) (June 30, 1947), 61 Stat. 193; 50 U. S. C. A. App. §§ 1891-1910.

Under this Act, new rental and procedural regulations were enacted but a portion of the old system of controls was adopted. A major difference was that in the 1947 Act the rights and duties of the parties were set out in detail, while the 1942 Act, as amended, allowed the Administrator to promulgate most of the substantive law of rent control.

The most significant change wrought by the new law was its statement of the purpose of ending rent control as soon as practicable, while recognizing a need for control during the postwar transition period. Another important feature was its recognition of hardships suffered by the owners of rental housing caused by maximum rents being too low. Accordingly, provision was made for adjustments to be made in such cases. It was also expressly stated that the central agencies exercise a minimum of control in these adjustments, placing the responsibility upon the local boards.[125]

The policy of eventually removing all controls was indicated in several new features of the new law. The Housing Expediter could remove controls in any area where he thought they were no longer needed because the housing shortage had abated.[126] He also was directed to create local boards to handle local adjustments and make recommendations relating to decontrol, rent levels and general operations.[127] This was in accord with shifting some responsibility to the local agencies. The law by its terms was to expire on February 29, 1948.[128] The details relating to the eviction of tenants were set out fully and imposed serious restrictions on the right of a landlord to evict a tenant.[129]

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125. 50 U. S. C. A. App., 1891 (b): "The Congress therefore declares that it is its purpose to terminate at the earliest practicable date all Federal restrictions on rents on housing accommodations. At the same time the Congress recognizes that an emergency exists and that, for the prevention of inflation and for the achievement of a reasonable stability in the general level of rents during the transition period * * *, it is necessary for a limited time to impose certain restrictions upon rents charged for rental housing accommodations in defense-rental areas. Such restrictions should be administered with a view to prompt adjustments where owners of rental housing accommodations are suffering hardships because of the inadequacies of the maximum rents applicable to their housing accommodations, and under procedures designed to minimize delay in the granting of necessary adjustments, which, so far as practicable, shall be made by local boards with a minimum of control by any central agency."

126. *Ibid.*, 1894 (c).

127. *Ibid.*, 1894 (e) (A) (B) (C).

128. *Ibid.*, 1894 (f).

129. 50 U. S. C. A. App., 1899 (Eviction of tenants).

Amendments in 1948 not only extended the Act until March 31, 1949, but made other changes as well. Several classifications of housing were decontrolled: trailers and trailer space; housing completed on or after February 1, 1947; housing unrented for 24 months between February 1, 1945 and March 30, 1948; and housing in a single-family unit not used as a boarding house.[130] The Housing Expediter was given power to make adjustments to correct hardships and inequities and 15% voluntary increases could be made in new leases.[131] Landlords could also recover possession for use by members of their families.[132] Local boards were given more power and responsibility.[133] It became possible for the recommendations of the board dealing with decontrol, adjustments and general operations to be submitted to the Emergency Court of Appeals if they were turned down by the Housing Expediter. That court could enter a final binding order, either approving or disapproving the recommendation.[134]

The year 1948 saw another United States Supreme Court decision upholding the constitutionality of rent controls. The Court upheld Title II of the Act as a valid exercise of the war power even though it was enacted after a Presidential Proclamation terminating hostilities.[135]

The law was extended again in 1949 to June 30, 1950. In addition to several minor amendments, there was an important amendment allowing Federal control to be ended by state law or findings of "no housing shortage" by municipalities. This was the final step in permitting the local agencies to decide the issue for themselves.[136]

The provisions of the law were extended several times and minor amendments were made. The law finally was to expire on April 30, 1953. However, shortly before that expiration date the Housing and Rent Act of 1953 (Public Law 23) became law on April 30, 1953.[137] It extended rent control to July 31, 1953, in areas having rent control as of April 30, 1953, and provided that controls in critical areas

130. *Ibid.*, 1892 (c) 1, 2, 3 and 4.
131. *Ibid.*, 1894 (b).
132. *Ibid.*, 1899.
133. *Ibid.*, 1894 (c) (4).
134. *Ibid.*, 1894 (e).
135. *Woods v. Miller Co.* (1948), 333 U. S. 138; 92 L. Ed. 596.
136. 50 U. S. C. A. App., 1894 (J).
137. U. S. Code, Congressional and Administrative News, No. 9, May 20, 1953, p. 1172.

could be extended to April 30, 1954. These critical areas had to be certified by the President as meeting the requirements of the law.

It has been well said that:

> "If the history of rent control teaches any lesson, it is that once such controls have been imposed they are difficult to remove * * *. The difficulty in dispensing with rent controls was not due solely to political considerations, although the political power of the tenant and working class did have much to do with it."[138]

—State and municipal activity

The Federal Government was the dominating influence in rent regulation. However, in addition to Federal activity in this field rent control has been applied by the states and municipalities in some cases.

A study[139] made in 1948 showed that out of the forty-eight states, ten had enacted rent control laws within recent times. These states were: Connecticut, Illinois,[140] Maryland, Minnesota, Missouri, New Jersey, New York, Rhode Island, Virginia and Wisconsin. In every state but New York this regulation was confined to residential premises. New York was the only one controlling rents of commercial and business premises.

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138. Willis, *op. cit.*, p. 71. See also *1947 Ann. Survey of Am. Law*. New York Un. School of Law, p. 852; same Survey, 1948, p. 693, *et seq.*, and 1949, p. 759.

139. Freidlander and Curreri, *op. cit.*, pp. 247-249. See also *1950 Survey of Am. Law*, N. Y. U., p. 632, 1951 Survey, p. 622, and 1952 Survey, p. 519.

140. The Municipal Court of Chicago is cnrrently staying executions on judgments for possession under the forcible entry and detainer law and is regulating rents in those actions by virtue of Senate Bill 235, adopted on April 21, 1953, by the 68th General Assembly, Ill. Rev. Stat. Chap. 57, § 17.1. This bill adds a new section to the forcible entry and detainer laws of Illinois. It was enacted to operate in the emergency created by the cessation of Federal rent controls.

When a plaintiff is awarded judgment in an action for "possession of premises nsed for residence purposes," the court is to examine all the circumstances of the case. If it finds immediate execution of the judgment would work a hardship on the defendant, a stay of execution may be granted for not more than nine months.

During the period of the stay, the new section provides that the court shall fix the rent at a rate not less than the rate in effect under Federal regulation on April 29, 1953, and may allow not more thau a 10% increase over that rate. The stay may be set aside if the defendant is 10 days delinquent in the payment of rent. This new section is to extend until April 30, 1955.

The section does not apply to the following cases:

1. A tenancy under a written lease effective after April 30, 1953.
2. Where defendant took possession after April 30, 1953.
3. Where the rent was not federally controlled on April 29, 1953.
4. Where the plaintiff is a bona fide purchaser for value of the premises after November 30, 1952 and wants to personally occupy the premises.

The study points out that with the exception of Rhode Island and Wisconsin, these are "stand-by" statutes limited to go into effect upon the end of Federal controls.

When the Housing and Rent Act of 1947 introduced the policy of eventually eliminating Federal rent controls, several cities adopted rent control ordinances. New York was the first to act. A comprehensive ordinance was adopted which was declared unconstitutional. The New York State Legislature thereupon validated the ordinance.[141] Baltimore adopted an ordinance delaying evictions. Buffalo adopted a hotel and rooming house ordinance controlling rents. Chicago had a limited rent control ordinance applying to hotels which was declared invalid by the Illinois Supreme Court.[142] Los Angeles also enacted a rent control ordinance applying to hotels, etc. Minneapolis permitted the courts to stay eviction up to 90 days. Philadelphia, St. Louis and San Francisco also had rent control ordinances passed, those in St. Louis being of a "stand-by" nature.[143]

These examples of municipal action seem to indicate that in the larger cities where tenants greatly exceed landlords in number the idea of rent control has great potency. In the absence of Federal control, with which many cities apparently have been satisfied, municipal regulation of rents may be present from time to time regardless of whether it has to be justified politically as a boom measure or as a depression remedy.

—Effects

Several effects of rent control in cities are obvious. One is that during a period of the existence of rent control repairs to apartment buildings do not take place with normal regularity, and in such buildings deterioration is apt to accelerate. A second is that capital funds do not go into the construction of rentable premises which cannot yield a fair return on the investment. And a third is that great numbers of small homes built on a minimum area of ground spring into existence on the outskirts of every city.[144]

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141. N. Y. City Adm. Code, § U41-70; validated by Laws 1948, Ch. 4, § 1, *et seq.*

142. *Ambassador East, Inc.* v. *City of Chicago* (1948), 399 Ill. 359, 77 N. E. 2d 803.

143. *Fricdlander and Curreri, op. cit.*, pp. 260-263.

144. In addition see "Rent Control," 97 Arch. Forum 176, Sept. 1952. A book review of *Implications of Rent Control—Experience in the United*

B. STATE LEGISLATION

To accord with the policy of placing public housing and slum clearance in the hands of local public agencies, the State legislatures have had to provide the necessary legislation. This legislation can be divided into two classes: (1) legislation designed to carry out the Federal program of financial assistance; and, (2) legislation designed to solve related problems independent of Federal aid. This

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States, by Leo Grebler, research professor in Urban Land Use and Housing at Columbia University. P. 176: "Effect on the people. The 'most serious effect of rent control and one that is economically and socially indefensible' is the way it divides the population into two groups bearing disproportionate shares of the burden of inflation: a) the 'haves' who own prewar homes or rent prewar apartments and are thus protected by rent control, and b) the 'have nots' (mainly new families with a veteran at the head) who must pay the high postwar cost of buying a house or renting a new (uncontrolled) apartment or must double up with another family.

"Effect on their spending habits. Housing expenditures of those protected by rent control have declined substantially in relation to their incomes. The weight of rent in the consumer price index fell from 18.1 in 1935-39 to 12.5 in 1947—the last year when rent control was still fully effective. Meanwhile, food increased from 33.9 to 42.0 and clothing from 10.5 to 12.0. Such a change in the pattern of consumer expenditures for a large number of families once established and firmly embedded in family spending habits, is hard to change.

"There is at least a presumption that the 1940-47 increase in food and clothing demand was based partly on income set free by rent control to buy other things. 'To the extent that this was so,' says Grebler, 'repression of rent inflation led to more price inflation in other fields,' * * *

"Effect on building for rent. Rental housing construction has been unusually low despite its exemption from rent control. It dropped from 36% of total dwelling-unit production in 1920-24 to 17% in 1946-50. This substantial decline can at least partially be ascribed to rent control, which established an atmosphere unfavorable to investment in rental housing. (There was always the chance that rent control might some time later be extended to new units. That this fear was not groundless is shown by what happened in several communities where rents were re-recontrolled after Korea.)"

P. 177: "Effect on prewar rental housing. The supply of existing rental housing has been reduced under rent control. Many owners, faced with the alternative of receiving a controlled rent or selling at an uncontrolled price, naturally preferred to sell. From 1940 to 1950 the number of single-family dwellings rented actually declined more than 1 million. Counting apartments too, the number of rented units increased only 4.6% while the numbers of owner-occupied units rose by 71%.

" 'It is indeed astonishing that the supply of rental housing was not reduced more sharply. In 1950 there were still more than 5 million detached single-family houses in the rental supply,' according to Grebler.

"Effect on waste of space. The percentage of changes indicating less intensive use of space are not so great or so uniform as one might expect. Comparative figures for 1940-50 showed that tenant-occupied units with 0.75 or less persons per room (*i. e.*, low-intensity use) increased from 48.4% to 51.5%." * * *

P. 184: "Rent control may be considered a means of redistributing the burden of inflation, not only between landlords and tenants, but also between the protected tenants and other housing consumers. This view of rent control becomes increasingly important when restrictions extend over long periods

latter class of legislation often has adopted some of the Federal concepts. However, ordinarily it is characterized by predominantly local financing.

Thirty-five states, four territories and the District of Columbia have enacted legislation authorizing local public agencies to undertake slum clearance and urban redevelopment projects. The general pattern of these statutes is to authorize the municipality,[145] the local public housing authority,[146] a separate redevelopment agency[147] or some combination of these, to acquire land in slum areas through exercise of the right of eminent domain, clear the land by razing structures, construct streets and utilities, and make the land available for redevelopment by private enterprise in accordance with redevelopment plans approved by the municipality at its "fair value" or "use value".[148] Generally this is less than the cost of acquisition.

The large amount of State legislation in this area requires that the scope of inquiry be limited, therefore the legislation of Illinois has been chosen as illustrative of the legislative activities of the states.

The following chart shows the two classes of legislation enacted by the Illinois General Assembly.

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during which population grows and the proportion of those enjoying the benefits of rent control declines."

See also: "Statement of the Metropolitan Housing and Planning Council Urging Removal of Rent Control" (1953), Chicago Public Library.

145. This is the case in Colorado, Connecticut, Delaware, Indiana (Indianapolis only), Kentucky, Maryland (Baltimore only), Michigan, Missouri, New York, Ohio, Texas (San Antonio only—by local charter), West Virginia and Wisconsin.

146. This is the pattern in Alabama, Alaska, Arkansas, Delaware, Florida, Georgia, Illinois, Kentucky, Louisiana, Massachusetts, Missouri, Nebraska (Omaha only), New Hampshire, New Jersey, Minnesota, Oregon, Puerto Rico, South Carolina, South Dakota, Tennessee, Virgin Islands, Virginia, West Virginia.

147. This is true in California, Delaware, District of Columbia, Hawaii, Illinois, Kentucky, Maine, Massachusetts, Missouri, New Jersey, North Carolina (in cities of 25,000 or over), Pennsylvania, Rhode Island and West Virginia.

148 Report of American Bar Association Section of Real Property, Probate and Trust Law, Committee on Planning, Rebuilding and Developing Communities, Elsa Beck, Chairman, PROCEEDINGS, 1952, pp. 43-4. Such legislation generally has been upheld against the contention that no public purpose is involved. The decisions have been collected and published by the Division of Law of the Federal Housing and Home Finance Agency. *Summaries of Slum Clearance and Public Housing Decisions, October 1949*, and *First Supplement*, July 1, 1951, Housing and Home Finance Agency, Office of the Administrator, Division of Law, Washington 25, D. C.

ILLINOIS HOUSING AND SLUM CLEARANCE LEGISLATION

Illinois Legislation Designed to Carry Out the Federal Program of Financial Assistance.

Housing Authorities Act	(1934)
State Housing Act	(1933)
Blighted Areas Redevelopment Act	(1947)
Act for Rehousing of Persons in Redevelopment Project Areas	(1947)

Illinois Legislation Designed to Solve Related Problems Independent of Federal Aid.

Housing Cooperation Law	(1937)
Neighborhood Redevelopment Corporation Act	(1941)
Blighted Vacant Areas Development Act	(1949)
Housing Development and Construction Act (Replaced State Contribution Act—1945)	(1947)

CHART 9

Illinois legislation designed to carry out the Federal program of financial assistance

The Illinois Housing Authorities Act, passed in 1934, is the basic statute for consideration in this category.

Illinois Housing Authorities Act

Purpose. The Illinois Housing Authorities Act[149] in its original form[150] had as its stated purposes (1) the provision of low-cost housing and (2) slum clearance projects.[151] Its constitutional base

149. Ill. Rev. Stat. 1951, Ch. 67½, §§ 1-27e. Adopted March 19, 1934. Constitutionality upheld in *Krause* v. *Peoria Housing Auth.*, (1939) 370 Ill. 356, 19 N. E. 2d 193.

150. The Act was amended and enlarged in 1937, 1938, 1941, 1945 and 1949.

151. The Act in its original form defined "project" as follows: "§ 17(g) 'Project' shall include all lands, buildings, and improvements, acquired, owned, leased, managed or operated by a housing authority, and all buildings and improvements constructed, reconstructed or repaired by a housing authority, designed to provide housing accommodations and facilities appurtenant thereto (including community facilities and stores) which are planned as a unit, whether or not acquired or constructed at one time even though all or a portion of the buildings are not contiguous or adjacent to one another; and the planning of buildings and improvements, the acquisition of property, the demolition of existing structures, the clearing of land, the construction, reconstruction, and repair of buildings or improvements and all other work in connection therewith."

Subsequent amendments in accord with the Federal program broadened the definition as follows: "'Project' shall also include (1) acquisition of (i) a slum or blighted area or a deteriorated or deteriorating area which is predominantly residential in character, or (ii) any other deteriorated or deteriorating area which is to be developed or redeveloped for predominantly residential uses, or (iii) platted urban or suburban land which is predominantly open and which because of obsolete platting, diversity of ownership, deterioration of structures or of site improvements, or otherwise substantially impairs or arrests the sound growth of the community and which is to be developed for predominantly residential uses, or (iv) open unplatted urban or suburban land necessary for sound community growth which is to be developed for predominantly residential uses, or (v) any other area where parcels of land remain undeveloped because of improper platting, delinquent taxes or special assessments, scattered or uncertain ownerships, clouds on title, artificial values due to excessive utility costs, or any other impediments to the use of such area for predominantly residential uses; (2) installation, construction, or reconstruction of streets, utilities, and other site improvements essential to the preparation of sites for uses in accordance with a development or redevelopment plan; and (3) making the land available for development or redevelopment by private enterprise or public agencies (including sale, initial leasing, or retention by the local public agency itself). If in any city, village or incorporated town there exists a land clearance commission created under the 'Blighted Areas Redevelopment Act of 1947' having the same area of operation as a housing authority created in and for any such municipality such housing authority shall have no power to acquire land of the character described in subparagraph (iii),

was the promotion of the health, safety, morals and welfare of the public.[152]

Procedures. Provision was made for the formation of Housing Authorities by cities of more than 25,000 inhabitants with the cooperation of the State Housing Board. These Housing Authorities were to be formed to engage in low-cost housing and slum clearance projects.[153] With approval of the State Housing Board, Housing Authorities were given power to acquire land by purchase, condemnation or otherwise, clear slum areas, construct and operate housing projects and to acquire property from any local, State or Federal agency for its purposes[154] and to manage and operate the facilities constructed by it and fix rentals with direct relation to the annual incomes of the persons to be accepted as tenants.

Financing. An authority was given power to borrow money upon its bonds, notes, debentures or other obligations and to secure them by mortgages on its property or pledges of its revenues.[155] An authority could also enter into agreements with Federal agencies in connection with the borrowing of funds or other financial transactions.[156]

Amendments. In 1937, amendments were adopted in conformity with the Federal program contained in the United States Housing Act of 1937. Most important of the amendments were those granting housing authorities power to borrow money, accept grants or other financial assistance, including insurance or guarantees of their bonds, from the Federal Government,[157] fixing rentals at the lowest possible rates so as to provide shelter for the low-income groups,[158] and providing for payment of nominal service charges in lieu of taxes.[159] These provisions were upheld by the Illinois Supreme Court.[160]

(iv) or (v) of paragraph 1 of the definition of 'project' for the purpose of development or redevelopment by private enterprise." Ill. Rev. Stat., Ch. 67½, § 17(g), as amended.

152. Ill. Rev. Stat. 1951, Ch. 67½, § 2.

153. *Ibid.*, § 3.

154. *Ibid.*, § 8.

155. *Ibid.*, §§ 8, 11.

156 *Ibid.*, § 12.

157 *Ibid.*, § 27.

158 *Ibid.*, § 24.

159 *Ibid.*, § 27(b) added by an Act approved July 12, 1938.

160 *Krause* v. *The Peoria Housing Authority* (1939), 370 Ill. 356, 19 N. E. 2d 193.

In 1949, the General Assembly again adopted amendments to keep the Act in step with the Federal program expressed in the Housing Act of 1949. Generally, the 1949 amendments broadened the powers of housing authorities and added power to undertake land assembly, clearance, rehabilitation, development and redevelopment projects, including rehabilitation and conservation of existing housing. Through the exercise of these powers, the statute made it possible for an authority to assist any individual, association, corporation or organization to carry out a development or redevelopment plan. The dependence of the State upon the Federal Government was encouraged by specifically including permission to an authority to do all things necessary to secure Federal aid for these newly authorized activities.[161]

State Housing Act of 1933

The State Housing Act of 1933[162] adopted limited dividend corporations as its chosen tool. It was geared to Federal emergency legislation in the beginning of the depression. It was the State's first halting effort to find a solution. Because of its limitations it never became a basic tool in the slum clearance or housing efforts and was superseded by the 1934 Act just discussed.

Purpose. The stated purpose of the Act was to eliminate and rehabilitate slum areas by encouraging private housing construction and slum clearance under public supervision.[163]

Procedures. Provision was made for the formation of limited dividend housing corporations by private individuals[164] with power to acquire property by the exercise of eminent domain, generally deal in land, and to construct and regulate housing for rental or for sale.[165] The corporations were made subject to regulation concerning rents, selling prices and dividends.[166]

Financing. These corporations were given power to borrow money and pledge their property as security.[167]

161. Ill. Rev. Stat., Ch. 67½, §§ 2, 8, 9, 27, 27a.
162. Ill. Rev. Stat., Ch. 32, §§ 504-550.
163 *Ibid.*, § 505.
164 *Ibid.*, §§ 506-508.
165 *Ibid.*, §§ 509, 529.
166 *Ibid.*, §§ 510, 533-535.
167 *Ibid.*, § 509.

Amendments. The Act was connected with the Federal program of financial aid by a 1934 amendment which enacted an emergency clause making the Act effective immediately upon its passage and approval so that such corporations could be created to take advantage of any Federal loans or grants available.[168]

A later amendment removed the fixed limits upon rental and sale prices, permitting them to be set by the State Housing Board.[169]

Blighted Areas Redevelopment Act of 1947 [170]

Purpose. The purpose of the Act was to create an independent public body to acquire slum and blighted areas[171] through the exercise of the power of eminent domain, reduce them to usable land, and resell the land at "use-value" to private enterprise for redevelopment projects.[172]

Procedure. Provision was made for the formation of a Land Clearance Commission[173] by municipalities. These have power (with the approval of the local governing body and the State Housing Board),[174] to determine which are slum or blighted areas, acquire such property by condemnation,[175] demolish any improvements thereon,[176] and sell it to private enterprise or convey it to public authorities for use as streets, parks, schools or playgrounds.

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168 Approved March 19, 1934. Laws 1933-34, Third Sp. Sess., p. 167, § 2.

169 Ill. Rev. Stat., Ch. 32, §§ 510 and 534.

170 Ill. Rev. Stat., Ch. 67½, §§ 63-91. The constitutionality of this Act was upheld in *Chicago Land Clearance Commission* v. *White* (1952), 411 Ill. 310, 104 N. E. 2d 236.

171 "'Slum and Blighted Area' means any area of not less in the aggregate than two (2) acres located within the territorial limits of a municipality where buildings or improvements, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land used or layout or any combination of these factors, are detrimental to the public safety, health, morals or welfare." *Ibid.*, § 65(j).

172 "'Redevelopment Project' means a 'Slum and Blighted Area Redevelopment Project' or a 'Blighted Vacant Area Redevelopment Project', as the case may be, as designated in the determination of the Commission pursuant to Section 13 of this Act." *Ibid.*, § 65(m).

"'Slum and Blighted Area Redevelopment Project' means a project involving a slum and blighted area as defined in sub-section (j) of this section." *Ibid.*, § 65(k). See note 171, *ante*, for sub-section (j), and note 180, *post*, for sec. 65(l). See also secs. 64 and 73.

173 *Ibid.*, §§ 67, 73.

174 *Ibid.*, §§ 73, 75.

175 *Ibid.*, §§ 73, 76.

176 *Ibid.*, §§ 73, 77.

Financing. The Act provided for funds to be acquired from State grants which must be matched by the municipality.[177] A municipality is empowered to incur indebtedness and issue bonds to raise funds for this purpose.[178]

Amendments. In 1949 amendments to the Act kept it in step with the Federal program contained in the Housing Act of 1949. Provision was made to allow a Commission to borrow money and accept contributions, capital grants, gifts, donations, services or other financial assistance from the Federal Government. Also Commissions were given power to issue debentures, notes and other obligations to the United States to secure any loans received.[179] The Act was also amended to permit the undertaking of "Blighted Vacant Area Redevelopment Projects."[180]

Rehousing of Persons in Redevelopment Project Areas [181]

Purpose. In 1947 an Act was passed to aid in the development of housing projects, to be constructed under the Housing Authorities Act,[182] by providing for State and municipal contributions. It provided for projects to be developed to help rehouse persons who were living in the site of a redevelopment project, undertaken pursuant to the Blighted Areas Redevelopment Act,[183] and were forced to move.[184]

Procedure. The Act gave to housing authorities the right to apply to the State Housing Board for a grant to develop housing projects for rehousing persons in redevelopment areas. In brief it

177 *Ibid.*, § 83.

178 *Ibid.*, § 86.

179 *Ibid.*, § 88(a).

180 "'Blighted Vacant Area Redevelopment Project' means a project involving (1) predominantly open platted urban or suburban land which because of obsolete platting, diversity of ownership, deterioration of structures or of site improvements, or taxes or special assessment delinquencies exceeding the fair value of the land, substantially impairs or arrests the sound growth of the community and which is to be developed for predominantly residential uses, or (2) open unplatted urban or surburban land to be developed for predominantly residential uses, or (3) a combination of projects defined in (1) and (2) of this sub-section (1)." *Ibid.*, § 65(1); see also secs. 64 and 73.

181 Ill. Rev. Stat. 1951, Ch. 67½, §§ 92-95, approved July 2, 1947.

182 See note 149, *ante*.

183 See note 170, *ante*.

184 Ill. Rev. Stat. 1951, Ch. 67½, §§ 92, 93.

provided that when the Board approves a grant and the municipality, wherein such a project is located, contributes an equal amount to the housing authority, the total amount shall be deposited in a fund for the use of the housing authority.[185]

A housing authority receiving these grants must conform to standards of economy, cost and fixed rentals and must establish priorities for persons from the redevelopment area who cannot otherwise be housed.[186]

Financing. Every municipality can incur indebtedness and issue bonds to raise funds for its contributive share of the grants. A municipality can also make grants even though they are not to be matched by State funds.[187]

Illinois legislation designed to solve related problems independent of Federal aid

The statutes in this category which have a bearing upon this study are as follows:

Housing Cooperation Law

Purpose. An Act entitled the "Housing Cooperation Law" was enacted in 1937.[188] Its basic purpose was promotion of effective cooperation between the State public bodies and housing authorities. Its basic theory was that housing projects are a governmental function.[189]

Powers. To promote cooperation, the Act gave the State public bodies power to do the following: (1) to dedicate, sell, etc., its property to a housing authority or the Federal Government; (2) to provide public facilities; (3) to furnish streets, alleys, etc.; (4) to assign or loan any of its employees to a housing authority; (5) to provide office space; (6) to make exceptions from building regulations and ordinances; (7) to plan or replan, zone or rezone areas; (8) to enter into agreements with a housing authority or the Federal Government; and (9) to lend money to a housing authority.[190]

185 *Ibid.*, § 93.
186 *Ibid.*, § 94.
187 *Ibid.*, § 95.
188 Ill. Rev. Stat. 1937, Ch. 67½, §§ 28-35.
189 *Ibid.*, § 29.
190 *Ibid.*, § 31.

The Neighborhood Redevelopment Corporation Act of 1941 [191]

Purpose. The purpose of the original Act was to interest private capital in the eradication and redevelopment[192] of slum and blighted areas.[193]

Procedure. Provision was made for the formation of private Neighborhood Redevelopment Corporations[194] under the supervision of Redevelopment Commissions,[195] with power to generally deal in land, to acquire property by the exercise of eminent domain, to demolish, rebuild, or repair existing improvements thereon and construct new housing.[196]

Financing. The corporations were given power to sell their stock and borrow money on the security of their properties.[197]

Amendments. In 1953 this Act was amended to encourage private capital in the preservation of areas which are in danger of becoming slums.[198]

Blighted Vacant Areas Development Act of 1949 [199]

Purpose. This Act was passed for the purpose of eradicating urban blighted vacant areas[200] and facilitating the development of housing in such areas.[201]

Procedure. When any private interest submits a workable plan for redevelopment to the State Housing Board and offers to pay

191 Ill. Rev. Stat., Ch. 32, §§ 550.1-550.44. The constitutionality of this Act was upheld in *Zurn* v. *City of Chicago* (1945), 389 Ill. 114, 59 N. E. 2d 18.

192 *Ibid.*, § 550.3-9. "'Redevelopment' means the eradication, rehabilitation and rebuilding of a Slum and Blight Area, and the provision for such industrial, commercial, residential or public structures or spaces as may be appropriate or necessary, including recreational and other facilities incidental or appurtenant thereto."

193 *Ibid.*, § 550.2.

194 *Ibid.*, § 550.6.

195 *Ibid.*, §§ 550.4, 550.6, 550.25.

196 *Ibid.*, §§ 550.9, 550.6, 550.42.

197. *Ibid.*, § 550.9.

198 Senate Bill 627, (1953). See Chapter V, *ante*.

199 Ill. Rev. Stat., Ch. 67½, §§ 91.1-91.7.

200 "'Blighted vacant area' means any undeveloped contiguous urban area of not less than one acre where there exists diversity of ownership of lots and tax and special assessment delinquencies exceeding the fair cash market value of the land within such area." *Ibid.*, § 91.3 (b).

201 *Ibid.*, §§ 91.1, 91.2.

cash for the land, the Board can recommend to the Governor the bringing of eminent domain proceedings to acquire the fee simple title for such purposes.[202] If it is approved, proceedings are started and title taken by the State of Illinois.[203] The land is then conveyed to the developer provided the redevelopment plan is approved by the municipality.[204]

Housing Development and Construction Act—1947

(Replaced State Contribution Act—1945)

An Act providing for State contribution was passed in 1945[205] to promote the improvement of housing by providing State grants to housing authorities and land clearance commissions. This was repealed in 1947 and replaced by a new Act providing for similar governmental assistance by the State.[206]

202 *Ibid.*, § 91.4.

203 *Ibid.*, § 91.5.

204 *Ibid.*, § 91.6.

205 Ill. Rev. Stat. 1945, Ch. 67½, §§ 51-52. Repealed by Act entitled "Housing Development and Construction Act," approved July 2, 1947, Senate Bill 549.

206 Ill. Rev. Stat. 1947, §§ 53-62.

CHAPTER SEVEN

PRIVATE RESTRICTIONS

The use of restrictions in controlling urban realty

Possibly no area of law more clearly reflects the evolutionary character of the concepts and rules which are influenced by city living than does the field of privately imposed limitations upon the use and improvement of urban realty.[1]

One of the obvious and seemingly inevitable effects which follows the crowding together of masses of people in a limited living area is that neighborhoods, if they are uncontrolled by some means, rather quickly change for the worse. Inquiry into the interesting problem of what human qualities bring this about is foreign to the scope of this paper. But it is a generally recognized fact that if a desired neighborhood atmosphere is to be preserved for long against the pressures of change for the worse then there is a need for some kind of measures to stabilize conditions and limit the use of realty involved. Frequently this results in dual efforts in that private measures are taken to supplement public acts which are aimed at these ends.[2]

It has been well said that:

> "* * * with the growth of cities and the more crowded conditions of modern life, the desire of home owners to secure desirable home surroundings has led to a demand for land limited entirely to development for residence purposes. This natural desire of householders has been exploited by realtors and land companies so that restricted residential property is now becoming the rule, rather than the exception, in or near our cities."[3]

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1. Charles E. Clark, *Real Covenants and Other Interests Which "Run with Land,"* 2d Ed. (1947), p. 170. See also: "The Role of Covenants as a Tool of Urban Redevelopment" by Charles S. Ascher, American Bar Association Section of Real Property, Probate and Trust Law, *Proceedings*, Sept. 1951.

2. For a discussion of the use of private covenants in urban redevelopment, see "Private Covenants in Urban Redevelopment" by Charles S. Ascher, being Part III of *Urban Redevelopment: Problems and Practices*, edited by Coleman Woodbury, University of Chicago Press (1953).

3. Charles E. Clark, *Real Covenants and Other Interests Which "Run with Land,"* 2d Ed. (1947), p. 170; *Hays* v. *St. Paul M. E. Church* (1902), 196 Ill. 633.

Scholarly differences and practical uses

Scholarly differences exist as to many aspects of the legal problems incident to creating and enforcing limitations and restrictions upon the use of land and improvements. They exist as to the historical development of the devices used, and even as to the appropriate nomenclature in that legal field. These differences have been well aired in legal writings.[4] But while the legal pundits have been engaging in stimulating arguments and sometimes fairly violent jousting in the fields of philosophical symmetry and historical accuracy, real estate subdividers, individual owners and their counsel have been concerned with practical problems connected with the creation or preservation of a desired situation with regard to their realty. They have used the tools available, many times inartificially, many times without full knowledge as to the choice of available alternative legal principles, or even correct ideas as to the legal consequences of action taken. Some legal tangles have resulted.

When realty has suddenly and substantially increased in value,[5] the courts frequently have been called upon to parse out the resulting rights and obligations and decide in the light of particular facts as

4. Compare Vol. 5, *Restatement of the Law of Property*, concerning "Servitudes" of which Prof. Oliver S. Rundell of the law faculty of the University of Wisconsin Law School was reporter and the comments thereon by Judge Charles E. Clark in his book, *Real Covenants and Other Interests Which "Run with Land,"* 2d Ed. (1947), p. 6, *et seq.* Also see, p. 171 and its copious footnotes. Also see, *The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute*, by Henry Upson Sims (1944), 30 Corn. L. Q. 1; and review of Judge Clark's second edition by Myres S. McDougal in 58 Yale L. J. 500.

5. For instance in the following cases the courts refused to allow the drilling of oil wells on land covered by restrictive covenants:

Southwest Petroleum Co. v. *Logan* (1937), 180 Okla. 477, 71 Pac. 2d 759. An "Owners' Certificate & Dedication" filed with the plat of an addition to Oklahoma City stated: "All lots in this plat are restricted to residences only * * *."

Smith Oil Co. v. *Logan* (Black, *et al.*, Intervener) (1937), 180 Okla. 474, 71 Pac. 2d 766. Companion case to one above involving Block 20 in the same addition to Oklahoma City. The restriction above quoted continues, "* * * except Lots 10 to 17 inclusive Block 17, on which apartments may be erected, and all of Block 20, on which retail business buildings or apartment houses may be erected."

However, in the following cases, the courts allowed the drilling of oil wells despite the presence of restrictive covenants:

Cooke v. *Kinkead* (1936), 179 Okla. 147, 64 Pac. 2d 682. A plat of an addition to Oklahoma City stated: "And no buildings in blocks one (1), four (4), five (5), eight (8), nine (9), twelve (12) or nineteen (19), shall ever be used or occupied except for that of residence exclusively, * * *."

Cooke v. *Kutin* (1936), 179 Okla. 157, 64 Pac. 2d 693. Issues of law and fact in this case are identical with those above and that opinion is controlling of the issues involved in this case.

between covenants, estates upon condition, possessory interests, equitable servitudes, licenses, and the other minutiae of a complicated array of legal problems. As a practical matter, those seeking to place restrictions upon realty generally have endeavored to make their intentions clear. Depending upon the ability and experience of their counsel, they have sought to use the legal device best suited to accomplishing their purposes.

Restrictions an open field for individualistic effort

As a general rule, the owner of land who desires to control or protect or improve an area which he is marketing may impose such restrictions as he sees fit, provided such restrictions are not against public policy.[6] This he may do in such a way that reasonable conditions which he imposes by some appropriate legal method become binding upon successive owners for a reasonable period of time.[7]

Legal basis

In general it may be said that the legal machinery to achieve the imposition of effective private restrictions has its basis in the function of courts of equity to prevent fraud and unfair dealing. Practical enforcement rests upon the equitable doctrine of notice, which is that he who takes land with notice of a restriction upon it will not in equity and good conscience be permitted to act in violation of its terms.[8]

Such restrictions do not depend for their existence upon legislative authority, which may reflect long-range community objectives as op-

6. Thompson, *Commentaries on the Modern Law of Real Property*, Vol. 4, Sec. 3360, p. 472; *Brandenburg* v. *Country Club Building Corp.* (1928), 332 Ill. 136, 163 N. E. 440; *Dixon* v. *Van Sweringen Co.* (1929), 121 Ohio St. 56, 166 N. E. 887; *Fitzsimmons* v. *South Realty Corp.* (1932), 162 Md. 108, 159 Atl. 111; *Anderson* v. *Marshall-Malaise Lumber Co.* (1935), 66 N. D. 216, 263 N. W. 721; *Ouachita Home Site & Realty Co.* v. *Cottie* (1938), 189 La. 521, 179 So. 841; *Grant* v. *Craigie* (1940), 292 Mich. 658, 291 N. W. 44; *Pappas* v. *Eighty Hundred Realty Co.* (Mo. App. 1940), 138 S. W. 2d 762; *Andrews* v. *Metropolitan Bldg. Co.* (1942), 349 Mo. 927, 163 S. W. 2d 1024; *Sheets* v. *Dilton* (1942), 221 N. C. 426, 20 S. E. 2d 344; *Lion's Head Lake* v. *Brzezinski* (1945), 23 N. J. Misc. 290, 43 Atl. 2d 729; *Housing Authority of Gattatin County* v. *Church of God* (1948), 401 Ill. 100, 81 N. E. 2d 500; *Spencer* v. *Poote* (1950), 207 Ga. 155, 60 S. E. 2d 371.

7. *Barton* v. *Moline Properties* (1935), 121 Fla. 683, 164 So. 551, 103 A. L. R. 725; *Whitmarsh* v. *Richmond* (1941), 179 Md. 523, 20 Atl. 2d 161; *Norris* v. *Wittiams* (1947), 189 Md. 73, 54 Atl. 2d 331.

8. Charles E. Clark, *Real Covenants and Other Interests Which "Run with Land,"* 2d Ed. (1947), p. 170.

posed to individual current thinking or unacceptable urban standards. It is possible for an owner to create some private restrictions by complying with the provisions of statutes, which set forth the requirements and procedures for the platting and subdividing of lands.[9] But most restrictions do not depend upon a statute or municipal ordinance to give them vitality. They are created by individual arrangements.

Absence of public control

So far, the imposition of reasonable restrictions is uncontrolled by public authority. However, there is some sentiment to the effect that the limitations commonly placed upon realty by private means fall into an area where public control and supervision are desirable and should be imposed.[10] To date such a program has not received statutory sanction.

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9. Common statutory conditions for the approval of a subdivision include:
1. Requirements as to street alignment, location (including dedication), widths, grades, names, building lines, landscaping and other similar factors;
2. Requirements as to block and lot sizes and shapes;
3. Requirements as to dedication of open spaces to public use;
4. Requirements as to installation of certain improvements such as street grading and surfacing, drainage, water supply, sewers, and other public utilities; and
5. Establishment of building lines.

10. Says Prof. Myres McDougal:
"* * * A more comprehensive theory and something more than theory, to wit, new institutions of administration, may be required. Elsewhere the reviewer, with others, has suggested the vague outlines of such a theory and measures. This theory begins with the recognition that the traditional technicalities, 'possessory interest,' 'easement,' 'license,' 'profit,' 'covenant running with the land,' 'equitable servitude,' and so on, make a completely confused reference to facts, to official responses to facts, and to relevant policies, and that operational meaning can be given to such technicalities only by locating them in context. This context includes community officials responding to a great variety of *controversies*, where the identifications and demands of the parties are quite different ('cases between the immediate parties when the issue was whether an enforceable agreement ever had been made, cases where it was assumed that an enforceable agreement had once been made between the original parties but raising questions of what protection should be given to this agreement against third parties, cases involving the assignability of the benefits of an agreement, cases requiring a determination of the rights and duties of the parties with respect to matters which they did not anticipate in their agreement, cases involving the termination of a once enforceable agreement, and cases concerning the subjection of private agreements to specific claims or general regulation by the community'), about *agreements* purporting to segmentize in infinite ways the continuum of possible uses of land that the community will protect, on *facts* involving very different kinds of *uses* (habitation, productive, servicing, governmental) and hence very different *objectives* of the parties, or different forms of 'land' (surface, air, light, water, minerals, oil, subsurface, etc.), or different *durations* (temporary, specified period, indefinite, permanent), or different numbers of users (public generally, specified private parties), or different

Where the restrictions imposed by zoning laws differ from the restrictions imposed by private covenants, neither overrules the other, but the property is subject to the burden of both.[11]

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forms of *evidence* of the agreement (non-verbal behavior, oral permission, action in reliance, unsealed writing, sealed writing, language of promise, language of grant), and using the traditional technicalities now as semantic equivalents, and again as opposites, to effect various distributions of individual and community values. An exposition which seeks to clarify the objectives of community intervention in this process, making wise choice between, and giving concrete detail to, such high level prescriptions as 'unincumbered alienability,' or 'reasonable permanency in land planning and development,' must make at least the minimal discriminations indicated above and identify such other variables, in different specific institutional contexts, as may be significant for determining what wise community policy may be in such contexts. Once policies are so clarified, an observer—making the same discriminations—may study in detail trends in official response, appraising their compatibility with such clarified policies, and noting with a new precision any differences in response that vary with different technical and policy arguments or with other environmental and predispositional factors. With the trends and conditions of official decision, and incompatibilities with community policies, so ascertained, it may become relevant to consider, not doctrinal purification alone, but a whole range of alternatives as rational means to a more effective securing of individual and community interest. It could be found that what private agreement needs most to make it efficient is an effective framework of public controls (to set basic design and minimum standards and to prevent irrational movement away from basic design), and that the task of clarifying and implementing community objectives is not one which can be performed once and for all, by rigid doctrinal prescriptions such as arbitrary time limits, but requires rather flexible doctrine and a continuous, expert supervision of constantly changing variables. The most effective reform of 'rights in the land of another' might be the administration in the first instance of private agreement, from creation to termination, by the same public officials who are charged with the duty of effecting a rational general plan by public controls. It is unlikely that Judge Clark would disagree with these proposals. It is to be hoped that in his third edition he may bring his surpassing acuity and powerful rhetoric to their militant advocacy."

Review by Myres S. McDougal, of *Real Covenants and Other Interests Which "Run with Land,"* 2d Ed. (1947), by Charles E. Clark, 58 Yale L. J. 500, *et seq.*

11. *Gordon* v. *Caldwell* (1924), 235 Ill. App. 170, 54 A. L. R. 843n; *Vorenberg* v. *Bunnell* (1926), 257 Mass. 399, 153 N. E. 884, 48 A. L. R. 1431; *Ludgate* v. *Somerville* (1927), 121 Oreg. 643, 256 Pac. 1043, 54 A. L. R. 837; *Dolan* v. *Brown* (1930), 338 Ill. 412, 170 N. E. 425, 428, 4 A. L. R. 2d 1176n, "A valid restriction upon the use of real property, incorporated in the deeds by or under which the owners hold title and which in no way threatens or endangers the safety, health, comfort or general welfare of the community, is neither nullified nor superseded by the adoption or enactment of a zoning ordinance."

See also: *Magnolia Petroleum Co.* v. *Drauver* (1938), 183 Okla. 579, 83 Pac. 2d 840, 119 A. L. R. 1112; *Strauss* v. *Ginzberg* (1944), 218 Minn. 57, 15 N. W. 2d 130, 134, 155 A. L. R. 1000, "Zoning ordinances, if less stringent, do not diminish the legal effect of private restrictions. Smith, Zoning Law and Practice, Sec. 3; Metzenbaum, Law of Zoning, p. 282 (d)."; *Ault et al.* v. *Shipley* (1949), 189 Va. 69, 52 S. E. 2d 56; *City of Richlawn* v. *McMakin* (1950), 313 Ky. 265, 230 S. W. 2d 902; *Faubian* v. *Busch* (1951) (Texas), 240 S. W. 2d 361; and "Zoning Ordinances and Restrictions in Deeds," by M. T. Van Hecke, 37 Yale L. J. 407; "Municipal Corporations—Zoning—Abrogation of Private Restrictive Covenants by Zoning Regulations," by Robert Dilts, 48 Mich. Law. Rev. 103 (1949).

Methods used to create restrictions

Frequently restrictions of the type under consideration have their origin in an agreement of some character. More often than not this agreement is embodied in and reflected by a deed of conveyance,[12] and constitutes a covenant, which, because it affects the enjoyment of the land, becomes a covenant which runs with the land. As such it passes with the conveyance of title and becomes binding upon successive owners.[13] Ordinary restrictive covenants permit or prohibit specified uses without attempting to impose a penalty of defeating the title in case of their violation. In addition to being found in deeds, real covenants running with the land may be found in a lease or in an agreement apart from a lease or deed. Or the limitations may arise out of equitable restrictions or equitable servitudes. Long ago in the famous case of *Tulk* v. *Moxhay*,[14] an English court laid down the principle that where an owner of land enters into a contract that he will use or abstain from using his land in a particular way or manner, equity will enforce the agreement against any purchaser or possessor with notice who attempts to use the land in violation of its terms, irrespective of whether the agreement creates a valid covenant running with the land at law or not.[15]

Generally, any agreement which fails to satisfy the formal requirements concerning a covenant running with the land at law may create an equitable restriction if it comes under this principle. Common practical examples are furnished by an agreement by implication, or one resulting from a general building plan or scheme.

Again they may be brought into being by methods which contain at least a continuing threat that violation will result in loss of title.

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12. Am. Jur. 608; "Most of the covenants between owners in fee are found in the deed from the grantor to the grantee," *American Law of Property*, Vol. II (1952), Sec. 9.9, p. 364; Charles E. Clark, *Real Covenants and Other Interests Which "Run With Land"* (1929), p. 157; Allison Dunham, *Modern Real Estate Transactions* (1952), p. 6; C. P. Berry, *Digest of the Law of Restrictions on the Use of Real Property* (1915), p. 27; *Restatement of the Law of Property*, Vol. I (1936), Sec. 24; Herbert Thorndike Tiffany, *The Law of Real Property*, Vol. I (1939), p. 301.

13. "The first known case of the application of this concept of a running benefit to a covenant other than one of title arose in Pakenham's Case * * * This, apparently, was the first instance of the recognition that the benefit of a contract relating to the use or enjoyment of land could run with such land, so as to be enforceable by a subsequent owner of the land." *Pakenham's Case* is found in Y. B. 42 Edw. III, f. 3, pl. 14 (1368). *American Law of Property*, Vol. II, p. 336. See also *Natural Products Co.* v. *Dolese & Shepard Co.* (1923), 309 Ill. 230, 140 N. E. 840.

14. 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848).

15. *American Law of Property*, Vol. II, p. 402.

This may be done by the ancient device of an estate upon condition subsequent created in a deed or will. Such restrictions depend for their vitality and enforcement upon a right of re-entry for condition broken.[16] Or they may owe their origin to another ancient estate, an estate subject to a special limitation created in a deed or will, and which depends for effective enforcement upon the possibility of reverter.[17]

Sometimes they arise out of an estate subject to an executory limitation created in a will or deed.[18]

Practical operations

But whatever may be the technical means of accomplishment, it long has been the custom of subdividers, in laying out urban communities, or in selling lots or selling houses built upon the lots, to impose many restrictions upon the property in addition to those socially imposed limitations, such as zoning, which may exist. The most common restrictions upon city realty relate to the improvement of the land and the character, location, size and use of buildings. The variety and form found in privately created restrictions are almost limitless. Among the most common are use, cost, and character of buildings, location of building lines, height limitations, prohibitions against the sale of intoxicating liquors, inhibition of business, and attempts to control racial occupancy.

16. "Littleton, in his treatise on *Tenures*, takes a chapter to discuss estates upon condition. From his observations, it is clear that the conception of an estate upon condition subsequent was recognized at that time." *American Law of Property*, Vol. I, p. 19. In footnote 1 under § 1.12, the author cites Littleton, *Tenures*, bk. III, c. 5. Littleton died in 1481, according to Plucknett, *A Concise History of the Common Law*, p. 245.

17. "The current cases illustrate the confusion in the minds of many lawyers and judges between the condition subsequent, with the right of entry reserved, and the estate on limitation, with the possibility of reverter reserved, and between the possibility of reverter and the resulting trust or 'equitable reversion.' While courts will usually construe doubtful language to create a trust rather than a condition subsequent, it is quite possible for a conveyancer, by the use of artistic language, to create a trust and a true condition subsequent so that the grantor may re-enter after the failure of the purpose of the trust." Dean Russell D. Niles, N. Y. Un. School of Law, *1948 Ann. Survey of Am. Law*, p. 703.

"At an early period, just when is not clear, the determinable fee appears to have been recognized." Simes, *The Law of Future Interests*, Vol. I, p. 24. In footnote 75 on p. 24, the author cites Y. B. 7 Edw. IV, 12a, pl. 2 (1467) for an early reference to such a limitation.

18. "As has been seen, executory interests were possible only by alienations under the Statute of Uses or Statute of Wills." Simes, *The Law of Future Interests*, Vol. I, p. 279. The author in footnote 24 on p. 35 cites the Statute of Uses as "Statute of Uses, 27 Hen. VIII, c. 10 (1536)." On p. 38 in footnote 29, he cites the Statute of Wills as "32 Henry VIII, c. 1 (1540)."

A mere catalogue of the kinds of restrictions which have been the subject of litigation sufficiently serious to reach the reports of the courts of last resort would be of imposing length. Types of restrictions commonly encountered in the litigated cases includes the following:

I. A variety of restrictions aimed at controlling the use to which realty may be put by successive owners. These fall into many subcategories, such as:

1. Limitation as to type of buildings which may be erected, primarily limitations restricting improvements to residences, or
2. Its counterpart, stated as a negative, a prohibition against erection or occupation for business or public purposes.
3. Prohibition of offensive businesses or trades, either in general terms or by specific designation.
4. Prohibition of specific business, trades, or activities.[19]
5. Limiting sale or occupancy to persons of a stated race, color or creed.

II. A great variety of provisions aimed at controlling a uniform or otherwise acceptable type of improvement. These are as varied as the personalities of those who devise them. They include provisions:

1. Defining the size, or shape of buildings, the number of families to be accommodated, or the materials going into the improvements.[20]
2. Limiting height of buildings.
3. Setting minimum cost standards.
4. Imposing an obligation to build or maintain a fence, or never to build a fence.
5. Prohibiting buildings disconnected from the main building.
6. Prohibiting embankments.

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19. Frequently encountered examples are: a. Hotel, tavern or inn purposes, b. Churches, c. Coalyards, d. Derricks, e. Distilleries, f. Filling stations, g. Garages, h. Handling of grain, i. Stables, barns, etc., j. Billboards, k. Greenhouses, l. Hospitals, m. Parking places, n. Printing businesses, o. Railroads, p. Restaurants, q. Sale or manufacture of intoxicating liquors, r. Stores, s. Studios, t. Undertaking establishments.

20. Frequently they go into detail concerning such things as: a. Awnings, b. Balconies, c. Basements, d. Bay windows, e. Cellar doors, areaways, etc., f. Columns, g. Eaves, h. Fire escapes, i. Gates, j. Ornamental projections, k. Pavilions, l. Porches, m. Porte-cocheres, n. Projected stories, o. Steps, p. Sun parlors, q. Walls, r. Windows. Also see "Restrictive Covenants other than Racial," *1950 Ann. Survey of Am. Law*, N. Y. Un. School of Law, p. 595. *et seq.*

III. Specific provisions to control the location of buildings by the establishment of building lines to be observed. These frequently also are shown upon the plat of the subdivision.

From a review of the many cases in this area which have been decided by courts of last resort, it appears that (1) experience of subdividers and purchasers of closely-built realty has disclosed a need for the taking of steps designed to preserve values and appearances of neighborhoods, (2) to aid in accomplishing such control, and either in lieu of or in conjunction with various social controls, wholesalers of realty and individual owners have followed the practice of imposing restrictions of various kinds upon neighborhoods in which they operate, (3) in doing this they have employed established legal principles of long standing, (4) these efforts generally are effective in many areas for substantial periods of years, but (5) they never have been a complete or satisfactory solution of the problem of preserving status quo, and (6) ultimately other pressures become apparent which cause many of these efforts to give way to the superior forces of evolutionary legal change.

Their limitations

As generally used, privately imposed restrictions are far from an adequate substitute for over-all city planning. Ordinarily they do not replace such measures for social control as the temper of the times dictates. They are an individualistic approach to the problem of preserving a desired condition for a limited time in a limited area. They lack the compulsion of a public law enforced by public officials who may impose a rigid pattern of integrated supervision upon everyone concerned, and at least in theory preserve a perfect result and prevent the "disintegrating erosion of particular exceptions."[21] For restrictions are neither self-policing nor self-enforcing. They exist and their effect persists only so long as they are generally conformed to. When violations begin, either some private person at his own expense must institute suit to enjoin the violation, or enforce other rights, or the violation will go unchallenged and other violations of the same or an aggravated kind will occur. Once a breakdown begins and goes unchallenged, courts refuse to enforce restrictive covenants, basing their action upon the principle of equitable estoppel or abandonment.[22] Consistently they refuse to enforce an

21. Mr. Justice Cardozo in *Meinhard* v. *Salmon*, 249 N. Y. 458, 464, 164 N. E. 545, 62 A. L. R. 1.

22. *Loud* v. *Pendergast* (1910), 206 Mass. 122, 92 N. E. 40; *Ocean City Land Co.* v. *Weber* (1914), 83 N. J. Eq. 476, 91 Atl. 600 (affirmed without

equitable restriction where a neighborhood changes, or when circumstances become so altered as to make enforcement undesirable.[23]

Possibilities of reverter and rights of entry

Changed conditions brought about by urban development frequently cause possibilities of reverter and rights of entry to become undesirable and inflexible burdens upon land,[24] and upon land titles.[25] In an effort to permit some measure of control over these

opinion in (1915) 84 N. J. Eq. 505, 94 Atl. 1102); *Bryant* v. *Whitney* (1918), 178 Cal. 640, 174 Pac. 32; *Gage* v. *Schavoir* (1924), 100 Conn. 652, 124 Atl. 535; *Schwartz* v. *Holycross* (1925), 83 Ind. App. 658, 149 N. E. 699; *Brandenburg* v. *The Country Club Bldg. Corp.* (1928), 332 Ill. 136, 163 N. E. 440; *Tindolph* v. *Schoenfeld Bros.* (1930), 157 Wash. 605, 289 Pac. 530; *Nashua Hospital Ass'n* v. *Gage* (1932), 85 N. H. 335, 159 Atl. 137; *Matthews Real Estate Co.* v. *National Printing and Engraving Co.* (1932), 330 Mo. 190, 48 S. W. 2d 911; *Oliver* v. *Marbut* (1938), 22 Tenn. App. 405, 123 S. W. 2d 859; *Rich* v. *Isbey* (1939), 291 Mich. 119, 288 N. W. 353; *Edwards* v. *Wiseman* (1941), 198 La. 382, 3 So. 2d. 661.

23. Charles E. Clark, *Real Covenants and Other Interests Which "Run with Land,"* 2d Ed. (1947), p. 198. In *Housing Authority of Gallatin County* v. *Church of God* (1948), 401 Ill. 100, 108, 81 N. E. 2d 500, the court said: "Restrictions upon the use of property in a particular subdivision, as here, and which are imposed as a part of a general plan for the benefit of all the lots affected, give to the purchasers of the lots a right in the nature of an easement, which will be enforced against owners of other lots so affected, where the intention is clearly shown by the restrictions and the enforcement of them is necessary for the protection of substantial rights. Conversely, equity will not enforce a building restriction where, by the acts of the grantor who imposed it, or of those who derived title under him, the property, and that in the general area, has so changed in character and environment and the uses to which it may be put as to make it unfit or unprofitable for use if the restriction be enforced, or where to enjoin violation of the restriction would be a great hardship on the owner and of no benefit to the plaintiff, or where the plaintiff has abandoned the restriction. *Cuneo* v. *Chicago Title & Trust Co.* 337 Ill. 589."

24. "The retention to the present day of the two feudal relics, the right of entry for condition broken and the possibility of reverter, is an amazing illustration of the reverence for tradition in property law. These reversionary interests have never been assimilated with other future interests, are still generally inalienable by deed or will, and are not subject to the reasonable restraints of the rule against perpetuities." Dean Russell D. Niles, N. Y. Un. School of Law, *1948 Ann. Survey of Am. Law*, p. 703.

In a note entitled "Proposed Illinois Statute on Possibilities of Reverter and Rights of Entry as Affecting Land Use Policy," 14 U. of Chi. L. R. 638, 640 (1947) it is said: "* * with only a few exceptions, American courts in dealing with conditions have refused to take into account anything other than the agreement originally made. As a result, possibilities of reverter and rights of entry are completely inflexible, operating in most jurisdictions wholly without concern for considerations of desirable land use."

25. Comment, "An Illinois Statute Relating to Rights of Entry and Possibilities of Reverter," 43 Ill. L. R. 90, 104 (1948): "The purpose of the statute was to settle the law regarding these future interests and to prevent long-forgotten restrictions and conditions from suddenly appearing as clouds of title and impairing marketability. * * *

"In view of modern conditions of urban development it is arguable whether the statute's fifty-year period may not be too long, and more basically, whether these future interests should not be abolished altogether. * * *"

technical interests and cause them to be responsive to the changes which inevitably occur in city neighborhoods, a number of legislatures have passed remedial statutes. In general, these take two forms. One seeks to limit the duration of the interest to a given period of time. The other seeks to bar actions to enforce the interest unless the action is commenced with fair promptness after a right of action comes into existence. As an illustration of the first of these types of statute, Illinois has an act[26] which states:

> "37e. Neither possibilities of reverter nor rights of entry or re-entry for breach of condition subsequent, whether heretofore or hereafter created, where the condition has not been broken, shall be valid for a longer period than fifty years from the date of the creation of the condition or possibility of reverter. * * *"

In 1953, this Act was supplemented by an act of the second type. It took the form of an amendment to the Limitations Act. The principal purpose of the amendment is to require suits to recover real estate, where those suits are based on breach of a condition subsequent, or the taking effect of a conditional limitation, to be brought within a short number of years after action could first be taken.[27]

Colorado,[28] Indiana,[29] Massachusetts,[30] Michigan,[31] Minnesota,[32] and Wisconsin[33] also have enacted laws attempting to treat this problem. The National Conference of Commissioners on Uniform State Laws recently has drafted a uniform act on the subject. So far it has not been adopted by any state.[34]

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26. Ill. Rev. Stat. (1951), Ch. 30, §§ 37b *et seq.* "The Illinois statute, unlike the earlier Massachusetts and Minnesota statutes, applies retroactively to conveyances and wills which were operative before the date of the statute. These statutes are significant because they seem to afford the only feasible method of limiting rights of entry and possibilities of reverter which might otherwise interfere with marketability for a century or more." Dean Russell D. Niles, N. Y. Un. School of Law, *1948 Ann. Survey of Am. Law*, p. 703.

27. Ill. Rev. Stat. (1953), Ch. 83, §§ 1, 1(a), (b), and (c). As to the difficult problem of when ordinary statutes of limitations commence to run in this type of case, see 1 Simes, Law of Future Interests, § 170, pp. 306 *et seq.*

28. Colo. Stat. Ann. (Supp. 1951), Ch. 40, § 154.

29. Ind. Stat. Ann. (1951), § 2-628.

30. Mass. Ann. Laws (Supp. 1951), Ch. 184, § 23.

31. Mich. Stat. Ann. (1937), § 26.46.

32. Minn. Stat. Ann. (1947), § 500.20.

33. Wis. Stat. (1951), § 230.46.

34. The Uniform Act Relating to Reverter of Realty was approved October 26, 1946, by the National Conference of Commissioners on Uniform State Laws, *Handbook of the National Conference of Commissioners on Uniform State Laws*, 1946, p. 314.

Race restrictions—an evolution

Probably the most controversial restriction, and one which clearly portrays an effect of the metropolis upon the legal concepts and rules of law relating to property, is the race restriction. Whether general social problems of race relations are fairly ascribable to the metropolis may be debatable. Since the Civil War, such problems have been constant and at times acute in the agrarian areas of the South. At present, they are world-wide in scope in both urban and rural sections, and exceedingly serious. But it seems clear that during the last generation the influx of great numbers of colored people into the crowded industrial areas, which theretofore had been predom-

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"Uniform Act Relating to Reverter of Realty—Prefatory Note

"The first draft of this Act was presented to the National Conference of Commissioners on Uniform State Laws at its session in 1943. That draft was patterned on acts found in Massachusetts, Minnesota and Wisconsin. There seemed to be a considerable demand, and bills on the subject had been introduced in various legislatures. Some of the power companies felt that such a law was needed and that improper drafting might cause difficulties in their rights of way.

"The ideas in Section 1 come largely from the Massachusetts act, though the exceptions express ideas which originated with the Committee. The ideas in Section 2 and Section 3 are drawn largely from the Minnesota Act.

"In 1943 and 1944, the Act was extensively discussed by the Committee and on the floor, and many suggestions made were adopted. It was approved by the Conference in 1944, but some suggestions of improvement having been made, it was withheld from promulgation until 1946. The improvements suggested have been incorporated in the draft.

"The aim of the bill is to limit possibilities of reverter, rights of re-entry, and powers of termination for breach of condition subsequent, and also to limit restrictive covenants. Since the limitation of restrictive covenants is a controversial subject, and since there are undoubtedly many states which would not approve such restrictions, the subject of restrictive covenants is in the alternative. The alternative matter is in brackets. If it is desired to limit restrictive covenants, then in the first Section the bracket marked (1) should be in and the bracket marked (2) should be out. If, on the other hand, it is not desired to limit restrictive covenants, then the bracket marked (1) should be out and the bracket marked (2) should be in. The Committee has not entered into any discussion as to the advisability of limiting restrictive covenants, but leaves the decision in that matter to whoever may see fit to use the Act."

"Uniform Act Relating to Reverter of Realty

"*Be it enacted* * * *

"Section 1. *(Conditions, Restrictions, Reverter.)* Every possibility of reverter, every right of entry or power of termination for breach of condition subsequent (1) (and every restrictive covenant), affecting the title or use of real property shall cease to be valid or operative at the expiration of (thirty) years after the effective date of the instrument creating it notwithstanding any provision in such instrument. This section shall not affect any condition, restrictive covenant, limitation or possibility of reverter existing on the effective date of this act or contained in a grant from the state or in any gift or devise for public, charitable, religious or educational purposes, neither shall it affect any lease present or future or any easement,

inantly white, and the entry of many Asiatics into the cities of the west, have at least caused all of the latent difficulties of race relations to become intensified. And, in the areas of real property law, there have been developments which are so closely identified with the metropolis that they cannot be ignored.

Time was when race restrictions applicable to realty generally were considered to be an effective means of preserving neighborhoods for white occupancy and ownership. In many cities over a long period of time, it was customary for owners in some sections to enter into covenants that they would not sell or lease to negroes, and for sellers to insert in deeds of conveyance provisions designed to limit the sale of realty and its occupancy to members of the white race, to the end of preventing the colored population of cities from acquiring ownership of realty in, or living in, white areas.

—In the courts

But unremitting attacks upon the principles involved within a comparatively short period have produced notable changes in the

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right of way, mortgage, or trust, or any communication, transmission or transportation lines, or any public highway, right to take minerals, or charge for support during the life of a person or persons (2) (or any restrictive covenant without right of re-entry or reverter).

"*Note*: If (1) is in, (2) is out, and vice versa.

"SECTION 2. *(Non-Forfeiture.)* Failure to perform any covenant or condition (or restrictive covenant) affecting the title or use of real property which is not of substantial benefit to the party or parties in whose favor it is to be performed shall not cause forfeiture of the property subject thereto.

"SECTION 3. *(Limitation.)* Any right to re-enter or repossess real property on account of breach of a condition subsequent shall be barred unless such right is asserted by entry or action within (six) years after the happening of the breach upon which such right is predicated.

"SECTION 4. *(Severability.)* If any provision of this act, or the application thereof to any person or circumstances, is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

"SECTION 5. *(Uniformity of Interpretation.)* This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

"SECTION 6. *(Short Title.)* This act may be cited as the Uniform Act Relating to Reverter of Realty.

"SECTION 7. *(Repeal.)* All laws or parts of laws which are inconsistent with the provisions of this act are hereby repealed.

"SECTION 8. *(Time of Taking Effect.)* This act shall take effect (on its passage)."

Dunham, "Possibility of Reverter and Powers of Termination—Fraternal or Identical Twins?" (1953), 20 U. of Chi. L. R. 215, p. 229, says:

"In addition to the traditional type of statute of limitations, some states have statutes designed to cut off stale claims for the purpose of making the title to land more marketable. Most of these refer to 'conditions' or 'restric-

application of legal doctrines which at one time seemed settled. Three cases furnish illustrations. One, *Corrigan* v. *Buckley,* was decided in 1926. The other two, *Shelley* v. *Kraemer* and *Barrows* v. *Jackson,* are recent.

Corrigan v. *Buckley*[35] arose in the District of Columbia. In 1921, 30 white persons, including Corrigan, owning 25 parcels of land improved by dwelling houses, on S Street in Washington, D. C., executed and recorded an indenture wherein they mutually covenanted and agreed that no part of those properties should ever be used or occupied by, or sold, leased or given to, any person of the negro race or blood; and that this covenant should run with the land and bind their respective heirs and assigns for 21 years from and after its date.

In 1922, Corrigan contracted to sell a house and lot to a negro named Curtis, who knew of the indenture.

The plaintiff sought specific performance of the indenture and an injunction to prevent the conveyance. The defendants claimed the indenture violated the Constitution and was void. The lower court entered a decree granting the injunction. On appeal, the United States Supreme Court held that it did not have jurisdiction because no constitutional or statutory question was involved.

In answering the charge that the indenture violated the Constitution, the United States Supreme Court said:[36]

> "* * * The Fifth Amendment 'is a limitation only upon the powers of the General Government,' * * and is not directed against the action of individuals. The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another, does not in other matters protect the individual rights of persons of the negro

tions' and few if any use the term 'limitations.' Since the reason for cutting off stale claims is applicable to limitations as well as conditions, it would seem that the legislature was not using the word 'condition' in its technical sense. Thus 'easements' have been held to be 'conditions or restrictions,' and conditions subsequent have been held to be 'restrictions.'

"Another type of statute also seems applicable to terminate both types of interest if it terminates any. This is the so-called 'marketable title' statute. These statutes frequently except 'conditions.' If this phrasing is meant to be technical language, an anomalous result follows: the statutes cut off possibilities of reverter and not powers of termination. Certainly the policy of these statutes does not permit a distinction between possibilities of reverter and powers of termination. Either both should be excepted from the statute or both included."

35. (1926), 271 U. S. 323. Opinion by Mr. Justice Sanford.

36. At pages 330, 331.

race. * * And the prohibitions of the Fourteenth Amendment 'have reference to state action exclusively, and not to any action of private individuals.' * * * It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void. * * *

"We therefore conclude that neither the constitutional nor statutory questions relied on as grounds for the appeal to this Court have any substantial quality or color of merit, or afford any jurisdictional basis for the appeal."

In 1948, the same general problem again was before the Court in the cases of *Shelley* v. *Kraemer* and *McGhee* v. *Sipes,* which were decided together.[37] The *Shelley* case was heard on certiorari to the Supreme Court of Missouri and the *McGhee* case on certiorari to the Supreme Court of Michigan.

The facts in the Missouri case were that on February 16, 1911, 30 out of 39 property owners on both sides of Labadie Street in St. Louis, signed and recorded an agreement restricting the use of their property for 50 years against the occupancy of negroes as owners or tenants. The signers owned 47 of the 57 parcels of land on the street.

On August 11, 1945, Shelley, a negro, received a warranty deed to one of these parcels from one Fitzgerald.

On October 9, 1945, respondents, as owners of other property subject to the restriction, brought suit in the St. Louis Circuit Court to restrain Shelley from taking possession of the property and to divest him of title. The trial court denied the relief asked. The Supreme Court of Missouri sitting *en banc,* reversed.

The circumstances of the Michigan case were similar. In June, 1934, one Ferguson and his wife, owners of property in Detroit, executed a contract restricting the use and occupancy of the property against all persons not Caucasians. The restriction was not to take effect until at least 80 per cent of the property fronting on both sides of the street in the block was subjected to this or a similar restriction. The restrictions were to be effective until January 1, 1960. The contract was recorded and similar agreements were executed in respect to 80% of the lots in the block.

37. (May 3, 1948), 334 U. S. 1.

Subsequently negroes acquired title to the property and went into occupancy. On January 30, 1945, owners of other property subject to the restriction brought suit in the Circuit Court of Wayne County. The court directed the negroes to move within 90 days and enjoined them from using or occupying the premises in the future. On appeal, the Supreme Court of Michigan affirmed.

The petitioners in both cases contended that judicial enforcement of the restrictive agreements violated rights guaranteed by the Fourteenth Amendment of the Federal Constitution and Acts of Congress passed pursuant to that Amendment. In answering this contention the United States Supreme Court said:

> "* * * the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated."

However, the Court said further:

> "We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.
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> "* * State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. * *
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> "We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the State courts cannot stand."

The most recent important decision concerning the problems of racial restrictions was made in the case of *Barrows* v. *Jackson*.[38] Peti-

38. (1953), 346 U. S. 249.

tioners sued respondent in a California state court to recover damages for an alleged breach of a racial restrictive covenant. The trial court held that the pleadings filed did not state a cause of action and that there was no basis for a recovery of damages. It therefore sustained a demurrer to the complaint. The District Court of Appeals affirmed.[39] The State Supreme Court refused to upset the decision of Court of Appeals. The Supreme Court of the United States granted certiorari.

In affirming the decision of the California Court of Appeals, the United States Supreme Court said, through Mr. Justice Minton:[40]

> "This Court held in *Shelley* v. *Kraemer,* 334 U. S. 1, that racial restrictive covenants could not be enforced in equity against Negro purchasers because such enforcement would constitute state action denying equal protection of the laws to the Negroes, in violation of the Fourteenth Amendment to the Federal Constitution. The question we now have is: Can such a restrictive covenant be enforced at law by a suit for damages against a co-covenantor who allegedly broke the covenant?
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> * * *
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> "* * * We granted certiorari, 345 U. S. 902, because of the importance of the constitutional question involved and to consider the conflict which has arisen in the decisions of the state courts since our ruling in the *Shelley* case, *supra.* Like the California court in the instant case, the Supreme Court of Michigan sustained the dismissal of a claim for damages for breach of a racial restrictive covenant, *Phillips* v. *Naff,* 332 Mich. 389, 52 N. W. 2d 158. See also *Roberts* v. *Curtis,* 93 F. Supp. 604 (Dist. Col.). The Supreme Court of Missouri reached a contrary result, *Weiss* v. *Leaon,* 359 Mo. 1054, 225 S. W. 2d 127, while the Supreme Court of Oklahoma has held that a claim for damages may be maintained against a white seller, an intermediate straw man, and a non-Caucasian purchaser for a conspiracy to violate the covenant, *Correll* v. *Earley,* 205 Okla. 366, 237 P. 2d 1017.
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> "* * * to compel respondent to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use

39. 112 Cal. App. 2d 534, 247 Pac. 2d 99.

40. 346 U. S. 249, 251, *et seq.*

of her property. The result of that sanction by the State would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants. If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant. Thus, it becomes not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages. The action of a state court at law to sanction the validity of the restrictive covenant here involved would constitute state action as surely as it was state action to enforce such covenants in equity, as in *Shelley, supra.*

"The next question to emerge is whether the state action in allowing damages deprives anyone of rights protected by the Constitution. If a state court awards damages for breach of a restrictive covenant, a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur. Solely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians. Denial of this right by state action deprives such non-Caucasians, unidentified but identifiable, of equal protection of the laws in violation of the Fourteenth Amendment. See *Shelley, supra.*

* * *

"There is such a close relationship between the restrictive covenant here and the sanction of a state court which would punish respondent for not going forward with her covenant, and the purpose of the covenant itself, that relaxation of the rule is called for here. It sufficiently appears that mulcting in damages of respondent will be solely for the purpose of giving vitality to the restrictive covenant, that is to say, to punish respondent for not continuing to discriminate against non-Caucasians in the use of her property. This Court will not permit or require California to coerce respondent to respond in damages for failure to observe a restrictive covenant that this Court would deny California the right to enforce in equity, *Shelley, supra;* or that this Court would deny California the right to incorporate in a statute, *Buchanan* v. *Warley,* 245 U. S. 60; or that could not be enforced in a federal jurisdiction because such a covenant would be contrary to public policy * * *."

—Administrative measures

Following the decision in *Shelley* v. *Kraemer*, the Federal Housing Commissioner and the Veterans' Administration adopted regulations which were designed to further render ineffective efforts at racial segregation in the occupancy or ownership of realty. The FHA regulations took the form of requiring an affirmative covenant by the mortgagor that until the mortgage has been paid in full, or the contract of insurance otherwise terminated, he will not execute or file for record any instrument which imposes a restriction upon the sale or occupancy of the mortgaged property on the basis of race, color or creed. They provide that the covenant shall be binding upon the mortgagor and his assigns and that upon violation thereof the mortgagee may, at its option, declare the unpaid balance of the mortgage immediately due and payable.[41]

Other paragraphs of the regulation require that a mortgagor must certify that until the mortgage has been paid in full, or the contract of insurance otherwise terminated, he will not file for record any restriction upon the sale or occupancy of the mortgaged property on the basis of race, color or creed or execute any agreement, lease or conveyance affecting the mortgaged property which imposes any such restriction upon its sale or occupancy,[42] and that a mortgagee must establish that no restriction upon the sale or occupancy of the mortgaged property, on the basis of race, color or creed has been filed of record at any time subsequent to February 15, 1950, and prior to the recording of the mortgage offered for insurance.[43]

The Veterans' Administration regulations follow the same general pattern. Their essence is that as to home loans guaranteed or insured subsequent to February 15, 1950, any title which is subject to restrictions against sale or occupancy on the ground of race, color or creed which have been created and filed of record subsequent to that date will not be acceptable.[44]

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41. 14 Fed. Reg. 7579-7582, § 221.26a. Regulations issued by Federal Housing Commissioner December 12, 1949. Similar regulations cover Multifamily Housing Insurance (§§ 232.15b, 232.23a) and other FHA fields of activity. §§ 251.27a, 251.32a and 251.35a.

42. 14 Fed. Reg. 7579-7582, § 221.30a.

43. 14 Fed. Reg. 7579-7582, § 221.30a.

44. Regulation of the Veterans' Administration regarding racial restrictions as provided by the amendment of February 15, 1950, VA Pamphlet 4-3 Revised, Lenders Handbook (Dec. 1948), §§ 36.4308(e), 36.4320(h) (5), 36.4350(b).

—Litigation concerning other racial problems

Particularly in the last generation problems of race relations have produced a large amount of litigation. Regardless of the particular segment of the racial problem which various court cases have involved, and practically every aspect of it has been brought before the courts in recent years, the fundamental question is the same. Frequently the courts have dodged it, but it still is present. It is, What degree of nonsegregation does the present-day urban community accept? A review of the current situation in several of the facets of the problem sheds some light on what may be expected to follow in the property field.

—Judicial treatment of racial problems in the field of education

Many cases in the United States Supreme Court have tested applicable constitutional principles in the fields of educational facilities. Many cases in State Courts have reflected local opinion. While the cases, which of late have been before courts of last resort, Federal and State, are not confined to principles of the law of property and do not involve facts relating to realty, they graphically illustrate the change which has occurred within a short space of years in judicial attitude toward a principle inherent in the sale and conveyance of real estate. And judicial attitude is a reflection, sometimes intuitive, sometimes carefully documented, generally belated, of public sentiment.

In 1927, in *Gong Lum* v. *Rice*,[45] the United States Supreme Court said that the question presented was "whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black." The Court avoided answering that question by saying:[46]

> "Were this a new question, it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution.
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> * * *
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> "Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black

45. 275 U. S. 78 (error to the Supreme Court of the State of Mississippi).
46. Pp. 86, 87.

pupils, but we cannot think that the question is any different or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races. The decision is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment."

In 1938, the Court had before it a case in which a negro citizen of Missouri who had graduated from Lincoln University, an institution maintained by the State of Missouri for the higher education of negroes, applied for admission to the law school of the University of Missouri.[47] He was refused admission and was referred to a statute of Missouri which provided that:

"Pending the full development of the Lincoln university, the board of curators shall have the authority to arrange for the attendance of negro residents of the state of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the state university of Missouri, and which are not taught at the Lincoln university and to pay the reasonable tuition fees for such attendance; provided that whenever the board of curators deem it advisable they shall have the power to open any necessary school or department. (Laws 1921, p. 86, § 7.)"[48]

Petitioner brought an action for mandamus to compel the curators of the University of Missouri to admit him, asserting the refusal constituted a denial of the equal protection of the laws in violation of the Fourteenth Amendment. On final hearing, an alternative writ was quashed and a peremptory writ was denied by the Circuit Court. The Missouri Supreme Court affirmed. The United States Supreme Court then reversed, saying:[49]

"* * * we must regard the question whether the provision for the legal education in other States of negroes resident in Missouri is sufficient to satisfy the constitutional requirement of equal protection, as the pivot upon which this case turns.

* * *

47. *Missouri ex rel. Gaines* v. *Canada, Registrar of the University of Missouri*, 305 U. S. 337 (certiorari to the Supreme Court of Missouri).

48. Mo. Rev. Stat. (1929), § 9622.

49. 305 U. S. 337, 348, *et seq.*

"The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination."

Ten years later in a case which arose in Oklahoma, petitioner, a negro, applied for admission to the School of Law of the University of Oklahoma, the only tax-supported law school in the State.[50] Her application was denied solely because of her color. The Court said:[51]

"The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. *Missouri ex rel. Gaines* v. *Canada.*"

Then, in 1950, came *Sweatt* v. *Painter*.[52] There petitioner, a negro, was denied admission to the University of Texas Law School by reason of a State law restricting the school to white students. He

50. *Sipuel* v. *Board of Regents of the University of Oklahoma* (1948), 332 U. S. 631 (certiorari to the Supreme Court of Oklahoma).

51. Id. 632, 633.

52. 339 U. S. 629 (certiorari to the Supreme Court of Texas).

was offered enrollment in a separate law school newly established by the State for negroes, which he refused. The question presented was, "To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university?" The Court said:[53]

> "Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered White and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, tradition and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.
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> * * *
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> "The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.
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> * * *
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> "We hold that the Equal Protection Clause of the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School."[54]

53. Id. 633, 634, 636.

54. Rehearing denied, 340 U. S. 846. No. 44.

In another Oklahoma case,[55] appellant, a negro, was admitted to the University of Oklahoma Graduate School, but was assigned to a seat in the classroom in a row specified for colored students; he was assigned to a table in the library; he was assigned to a special table in the cafeteria. An Oklahoma statute permits negroes to attend institutions of higher learning attended by white students "upon a segregated basis" where such schools provide courses unavailable at negro schools. The Court said:[56]

> "It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. * * The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits.
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> * * *
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> "We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race."

—The "separate but equal" problem

While it has not yet decided the ultimate question of whether or not the furnishing of separate but equal facilities to whites and negroes in and of itself constitutes improper State action and is a violation of constitutional rights, a decision of that basic point cannot be long delayed. The United States Supreme Court has pending before it a number of cases which seem to make such a decision inevitable. They involve segregation in the elementary schools of Topeka, Kansas, primary and secondary schools of South Carolina, high schools in Virginia, public schools in the District of Columbia and in Delaware. They involve both constitutional and statutory authority for segregation where equal facilities are furnished. Also they involve factual situations ranging from the easily resolved case

55. *McLaurin* v. *Oklahoma State Regents for Higher Education*, (1950), 339 U. S. 637 (appeal from the United States District Court for the Western District of Oklahoma).

56. Id. 641, 642.

where facilities admittedly are unequal to the difficult one where the physical facilities are at least equal and the real question left is whether segregation of races in and of itself is a violation of constitutional rights. They were argued orally in December 1952, and are to be reargued. In an order entered June 8, 1953, restoring them to the docket for reargument, the Court indicated the legal areas which it wished the arguments to cover and which therefore it must have viewed as going to the heart of the problem. It said:

> "In their briefs and on oral argument counsel are requested to discuss particularly the following questions insofar as they are relevant to the respective cases:
>
> "1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
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> "2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
>
> (a) that future Congresses might, in the exercise of their power under Sec. 5 of the Amendment, abolish such segregation, or
>
> (b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?
>
> "3. On the assumption that the answers to questions 2(a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?
>
> "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,
>
> (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
>
> (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

(a) should this Court formulate detailed decrees in these cases;

(b) if so what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

"The Attorney General of the United States is invited to take part in the oral argument and to file an additional brief if he so desires."[57]

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57. 21 *United States Law Week*, 3307.

The pending cases are:

Brown, et al. v. *Board of Education of Topeka, Shawnee County, Kansas.* Negro residents of Topeka sought an injunction against the enforcement of a Kansas statute (Chap. 72-1724, Kansas General Statutes) which authorizes segregation in the elementary schools in cities of the first class—those having a population over 15,000—on the grounds of deprivation of equal educational opportunities in violation of the Fourteenth Amendment. No Kansas statute or constitutional provision requires segregation in the public schools.

The Federal District Court (98 F. Supp. 797) found no differences in the negro and white schools, and although it did find that segregation in and of itself creates a "sense of inferiority" in negro children which affects their motivation to learn, following *Plessy* v. *Ferguson*, 163 U. S. 537, the District Court held there was no violation of the Fourteenth Amendment.

Case was argued December 9, 1952, before the Supreme Court.

Briggs v. *Elliott.* Negro residents of South Carolina seeks a declaratory judgment that racial segregation in the primary and secondary schools violates the Fourteenth Amendment and an injunction. The constitution and statutes of South Carolina make segregation mandatory.

The Federal District Court (98 F. Supp. 529) ordered the school authorities to improve the negro schools to make them equal with the white schools but refused to hold segregation invalid *per se*. The Supreme Court (342 U. S. 350) on appeal remanded the case so that the District Court might consider the school authorities' report. At the second hearing the District Court reaffirmed its prior decisions and declared the school authorities were complying with its order.

Case argued December 9 and 10, 1952, before the Supreme Court.

Davis v. *County School Board of Prince Edward County, Virginia.* This cases involves racial segregation in the high schools of Prince Edward County, Virginia. The county contains about 15,000 people, half of which are negroes. Virginia's Constitution requires segregation in the schools.

A Federal District Court for Eastern Virginia refused to hold that

—Other areas

Other cases showing a similar trend have occurred in the areas of transportation,[58] public eating places,[59] recreational areas,[60] and public housing.[61]

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segregation in and of itself is invalid. The court did find that school facilities for negroes were inferior to those of the white students and ordered the completion of a new negro high school which had already been planned.

Case argued December 10, 1952, before the Supreme Court.

Bolling v. *Sharpe*. Petitioners contend that segregation of the races in public schools of the District of Columbia violates the Fifth Amendment, deprives negroes of their civil rights in violation of 8 U. S. C. 41 and 43, and deprives them of educational opportunities in violation of the United Nations Charter.

The court held (D. C. Dist. Col., April 9, 1951) that the District of Columbia's maintenance of separate public schools for negro and white students is not forbidden by the Federal Constitution.

Certiorari granted.

Argued December 10 and 11, 1952, before the Supreme Court.

Gebhart v. *Belton*. Two cases in which negro citizens of Delaware sought a declaratory judgment that "the provisions of the Delaware Constitution and laws requiring segregation in the public schools are in contravention of the equal protection clause of the Fourteenth Amendment to the Federal Constitution," and also an injunction "restraining the defendants from denying plaintiffs' admittance to the high schools and the elementary schools maintained for white pupils."

The Delaware Supreme Court (91 Atl. 2d 137) upheld a lower court's finding that the facilities for negro students were inferior to those of the white students, and the court ordered the admission of the negro plaintiffs into the white schools.

Appeal taken by the State of Delaware.

Certiorari granted.

Argued December 11, 1952, before the Supreme Court.

58. In the early case of *Hall* v. *DeCuir* (1877), 95 U. S. 485, the United States Supreme Court held void an act of Louisiana which required those engaged in the steamboat transportation of passengers among the states to carry colored passengers in Louisiana in the same cabin with whites.

In 1890, the Court decided *Louisville &c. Railway Co.* v. *Mississippi*, 133 U. S. 587, which involved a state statute. The Court said (page 589):

"* * * The question is limited to the power of the State to compel railroad companies to provide, within the State, separate accommodations for the two races. Whether such accommodation is to be a matter of choice or compulsion does not enter into this case."

In holding the statute valid, the Court conveniently found that the statute applied solely to commerce within the State. It said (p. 591):

"* * * If it be a matter respecting wholly commerce within a State, and not interfering with commerce between the States, then, obviously, there is no violation of the commerce clause of the Federal Constitution."

In 1896, the Court decided *Plessy* v. *Ferguson*, 163 U. S. 537. It said (pp. 540, 541):

"This case turns upon the constitutionality of an act of the Geueral Assembly of the State of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. Acts 1890, No. 111, p. 152."

In holding this act constitutional, the Court, through Mr. Justice Brown, said (pp. 542, 544, 545, 550-2):

"The constitutionality of this act is attacked upon the ground that if conflicts both with the Thirteenth Amendment of the Constitution, abolishing

The shadow of the future

Constitutional provisions, statutory enactments, the rulings of courts and the regulations of administrative agencies do not wipe out racial prejudice or of themselves bring about complete public ac-

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slavery, and the Fourteenth Amendment, which prohibits certain restrictive legislation on the part of the States.

"1. That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument.

* * * * *

"The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

* * * * *

"So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People* v. *Gallagher*, 93 N. Y. 438, 448, 'this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government,

ceptance of racial social equality. And so in the metropolis efforts still continue to find effective ways to accomplish that racial segregation which recent decisions have condemned. The methods of the

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therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed.' Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."

See also: *Chesapeake and Ohio R'y Co.* v. *Kentucky* (1900), 179 U. S. 388: *Chiles* v. *Chesapeake & Ohio Railway* (1910), 218 U. S. 71; *McCabe* v. *A. T. & S. F. Ry. Co.* (1914), 235 U. S. 151; *South Covington & Ry. Co.*, v. *Kentucky* (1920) 252 U. S. 399.

In *Mitchell* v. *United States* (1941), 313 U. S. 80, involving the right of a negro to Pullman accommodations, the Court, through Mr. Chief Justice Hughes said (pp. 94-5):

"* * * The question whether this was a discrimination forbidden by the Interstate Commerce Act is not a question of segregation but one of equality of treatment. The denial to appellant of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment (*McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 160-162; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 344, 345) and in view of the nature of the right and of our constitutional policy it cannot be maintained that the discrimination as it was alleged was not essentially unjust. In that aspect it could not be deemed to lie outside the purview of the sweeping prohibitions of the Interstate Commerce Act."

In 1946, in *Morgan* v. *Virginia*, 328 U. S. 373, the Court held invalid a Virginia statute. It said (pp. 385-6):

"In weighing the factors that enter into our conclusion as to whether this statute so burdens interstate commerce or so infringes the requirements of national uniformity as to be invalid, we are mindful of the fact that conditions vary between northern and western states such as Maine or Montana, with practically no colored population; industrial states such as Illinois, Ohio, New Jersey and Pennsylvania with a small, although appreciable, percentage of colored citizens; and the states of the deep south with percentages of from twenty-five to nearly fifty per cent colored, all with varying densities of the white and colored races in certain localities. Local efforts to promote amicable relations in difficult areas by legislative segregation in interstate transportation emerge from the latter racial distribution. As no state law can reach beyond its own border nor bar transportation of passengers across its boundaries, diverse seating requirements for the races in interstate journeys result. As there is no federal act dealing with the separation of races in interstate transportation, we must decide the validity of this Virginia statute on the challenge that it interferes with commerce, as a matter of balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate travel. It seems clear to us that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel. Consequently, we hold the Virginia statute in controversy invalid."

59. *District of Columbia* v. *Thompson Co.* (1953), 346 U. S. 100.

In 1950, in *Henderson* v. *United States*, 339 U. S. 816, the Court held that requirements as to separate tables in dining car service violate the Interstate

moment are disclosed in a current magazine article, found in a magazine devoted to real estate interests, entitled "Supreme Court bars damage suits over racial covenants."[62] It reads:

Commerce Act. It said (pp. 825-6): "* * * Discriminations that operate to the disadvantage of two groups are not the less to be condemned because their impact is broader than if only one were affected. *Cf. Shelley* v. *Kraemer*, 334 U. S. 1, 22."

Compare *Powell* v. *Utz* (1949), 87 F. Supp. 811, in which a United States District Court held that a civil rights statute of the State of Washington prohibiting racial discrimination in public accommodations was applicable to a restaurant, and *Nash* v. *Air Terminal Services, Inc.* (1949), 85 F. Supp. 545, in which a United States District Court in Virginia sustained a Virginia statute requiring segregation, holding that (p. 548) "Segregation is not violative of the Federal Constitution or of any act of Congress." (p. 549): "With segregation in effect at the airport, Air Terminal [operator of the restaurant in Washington National Airport] offended no constitutional or statutory precept in denying the plaintiff service in any restaurant save that established for the Negroes, but it did violate the plaintiff's constitutional rights if it did not furnish her there, eating accommodations substantially equal to those provided in the restaurants for whites. The impact here of the Constitutional Amendments is not barred by the doctrine that their safeguards apply only as between the State or Federal government and the citizen, rather than between citizen and citizen. The instant segregation was pursant to a federal statute (the Assimilative Crimes Act) and under a federal executive's instructions, in effect governmental action, and unless provision was made for substantially equal accommodations to the plaintiff as a Negro citizen, she was deprived, by Air Terminal acting under the segregation laws and regulations of the United States, of her rights without due process of law, contrary to the Fifth Amendment of the Constitution of the United States."

60. *Valle* v. *Stengel* (1949), 176 Fed. 2d 697 (swimming pool, Palisade Amusement Park). In *Rice* v. *Arnold* (1950), (Fla.) 45 So. 2d 195 (country club golf course): in holding there was no discrimination the Supreme Court of Florida said (p. 198): "The relator-appellant requests this Court to hold as a matter of law that he is entitled to use the city's golf course at all hours and times it is open to play despite the findings of fact in the court below that he now enjoys substantially equal accommodations provided for persons of the different races. It does not appear by the record that the one day allotment of the facilities of the course to the Negroes discriminated against the Negro race. The days of playing each week were apportioned to the number of white and colored golfers according to the record of the course kept by the respondent. If an increased demand on the part of the Negro golfers is made to appear, then more than one day each week will be allotted." After a petition for writ of certiorari to the Supreme Court of Florida had been granted by the United States Supreme Court, (1950) 340 U. S. 848, 54 So. 2d 114, the Supreme Court of Florida, *en Banc* said (p. 120): "It is now the judgment of this court that the opinion and judgment of this court filed herein March 24, 1950 be, and the same is, hereby withdrawn, vacated and set aside; that in accordance with the mandate of the Supreme Court of the United States, we have reconsidered this cause in the light of recent decisions of that court and, upon such reconsideration, for the reasons hereinbefore stated, the judgment of the Circuit Court of Dade County is hereby affirmed." Subsequent petition for writ of certiorari denied (1952), 342 U. S. 946.

See also: *Sweeney* v. *City of Louisville* (1951), 102 F. Supp. 525 (public golf course), affirmed (1953), 202 Fed. 2d 275; *Williams* v. *Kansas City, Mo.* (1952), 104 F. Supp. 848 (municipal swimming pool); *Hayes* v. *Crutcher* (1952), 108 F. Supp. 582 (city golf course).

"In 1948, the U. S. Supreme Court ruled that racial real estate covenants are legal on a voluntary basis, but cannot be enforced in courts. Last month, the court went a step further, decided a house owner may not be sued for damages for violating a covenant.

"The decision was no surprise. Moreover, since 1948, realty men had devised at least two ways of barring Negroes from new white neighborhoods without resorting to covenants. Under one plan, used in Washington and elsewhere, developers require home buyers to guarantee them exclusive listing of the house if it is ever offered for resale. Another dodge is a neighborhood club. By limiting sales in a tract to club members, the members can exclude anyone they choose.

"Both systems work most effectively in new developments. The nation's chief battle over segregation was being fought out in older neighborhoods. And there, though segregation was dying hard, bit by little bit the evidence grew that it was dying. Item:

"In Western Springs (pop. 7,000), an upper-middle-class community southwest of Chicago, Dr. Arthur G. Falls, a Negro chest surgeon, won a court fight to prevent a park district from taking his $7,500 lot by eminent domain for a new park and playground. Dr. Falls, whose plans to build a $50,000 brick house have been stymied since July 1952 by the litigation, will become the first Negro home owner in the town. Ruled Cook County Circuit Judge Jacob Berkowitz: 'If this land were condemned and taken by the park district it would be a monument in that particular area to hate and intolerance.'"

61. See *Seawell* v. *MacWithey* (N. J. 1949), 63 Atl. 2d 542. Compare *Dorsey* v. *Stuyvesant Town Corporation* (1947), 190 Misc. 187, 74 N. Y. S. 2d 220, affirmed 274 App. Div. 992, 85 N. Y. S. 2d 313.

62. *House & Home*, July 1953, p. 39.

CHAPTER EIGHT

COMMERCIALLY ACCEPTABLE URBAN REAL ESTATE TITLES

Local character of the problem

One of the readily discernible influences of the metropolis on the concepts, rules and institutions relating to property is reflected by the customs and procedures which have developed in urban real estate transactions on the question of what constitutes a commercially acceptable real estate title. In this area there is no one, countrywide, uniform standard. It is a matter which is peculiarly local and is based upon historical developments of local or sectional character. The problem is one which is common to every section of the country. It is that of demonstrating that a title to realty is adequate, so that a purchaser will pay his money for it or a mortgage lender will accept it as security. The means by which this is done, and even the test of when it has been accomplished, differ in different cities.

Methods of judging titles

In general, there are four methods of determining what is an acceptable title in use in different cities in the United States. They are:

—(1) Searching records

The first of these, and the oldest in point of use, is a direct search of the public records by lawyers, who judge the results and give opinions as to the quality of the title. This system continues to be common to many of the rural and smaller urban areas of the eastern states. Where this system is employed, abstracts of title of the character known to the Midwest, which are made for hire by abstracters engaged in that business, do not exist, but the examining lawyers make their own investigations and furnish their clients with opinions of title. In effect the title examiners do what in other areas is done by a combination of abstracter and title examiner.

—(2) Abstracts of title and attorneys' opinions of title

In much of the country the foundation of title work is the preparation or continuation of an abstract of title. Generally, the abstract is prepared by an abstracting company engaged in that business. The function of the abstract is to reflect all matters of public record which may affect the title to the property involved. An examining lawyer then examines the abstract and renders his opinion, limiting it to the quality of title revealed by the abstract.

—(3) Title insurance

A third method of determining whether a title is acceptable is by title insurance. In some areas, the willingness of a title insurance company to insure the title has become the test in the community of its acceptability. The Supreme Court of California recently said:

> "Title insurance is a contract to indemnify against loss through defects in the title or against liens or encumbrances that may affect the title at the time when the policy is issued. (Citing cases.) It is a reasonable method by which a vendee may determine the merchantability of the vendor's title; * * *"[1]

This test is the one ordinarily encountered in most of the large cities throughout the country. Other jurisdictions employ title insurance as one of several tests in determining whether a title is acceptable, or use it when a title is sound but technically unmerchantable so that a sale or mortgage could not be consummated in the absence of a policy acceptable to the parties and their counsel.

—(4) Torrens System

Another method used in determining whether a title is acceptable is the furnishing of a Torrens certificate which reflects the character of the vendor's title. The availability of the Torrens System is limited to a small per cent of the transactions which occur in about one per cent of the counties of the United States. These are located in a few states which have adopted legislation authorizing its use.[2]

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1. *King* v. *Stanley* (1948), 32 Cal. 2d 584, 590, 197 P. 2d 321.

2. Report of Committee on Acceptable Titles to Real Property, American Bar Association Section of Real Property, Probate and Trust Law, August 1953.

See note 38, *post*.

The applicable test

The test of what constitutes an acceptable title (as distinguished from the technique of finding the facts which determine the quality of title, or the method or agency for judging the result) has been in a process of commercial evolution which has paralleled the growth of urban areas in which most real estate transactions take place. In practical effect the idea of what constitutes an acceptable title has changed from the concept of a substantially flawless title perfectly connected by a chain of conveyances from the original sovereign to the present owner, every element of which is disclosed by the public record, and no element of which presents a substantial question, to a title which, despite some imperfections, is sufficiently sound so that in a busy commercial world a purchaser will buy it with reasonable confidence in his ability to fully enjoy the usual rights of an owner, plus ability to satisfy a subsequent purchaser or mortgage lender that he in turn will acquire sufficient rights to accomplish those purposes. The area is one where perfection and highly conservative technical judgment of examining lawyers have been confronted with the circumstance that in a workaday world people have become intolerant of unrealistic flyspecking title opinions, which cause delay, expense and trouble. As a practical matter buyers, sellers and lenders of mortgage money have more and more come to require some means of quickly accomplishing their desired ends with reasonable safety but with no concern or tolerance for unneeded technical perfection.[3]

The merchantable title rule

The easily stated general rule is that unless a contract for the sale of real estate provides otherwise, the seller must convey to the

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3. Paul E. Basye, "Streamlining Conveyancing Procedure" (1949), 47 Mich. Law Rev. 935, 1097.

4. Robert Kratovil, *Real Estate Law*, p. 83.

"A purchaser of land, before he is required to pay the purchase price, is entitled, unless stipulated to the contrary, to receive a marketable title, a title that is fairly deducible of record and not depending on matters resting in parol." *White* v. *Evans* (1949), 120 Col. 200, 208 Pac. 2d 922, 926.

As a general rule, and in the absence of contract provisions which control to the contrary, it is said that a title is not considered marketable where it rests in parol or is a materially defective record title which can be cured only by a resort to parol or extrinsic evidence (66 C. J., § 539, pp. 870-2; *Whitfield* v. *McClendon* (Ala. 1948), 38 So. 2d 856, 858).

purchaser a marketable title. Such a title also frequently is called a merchantable title[4] or good title.[5]

The essence of the rule of marketable title is that when a real estate sales contract by express terms or legal effect requires the purchaser to convey a marketable title, the contract purchaser cannot be compelled against his wish to accept a doubtful title which may reasonably and fairly be questioned or which has defects which would materially impair its marketable quality. In other words a marketable title is a substantially flawless title of such high quality that a court of equity will force it upon an unwilling contract purchaser.[6]

The original concept of a marketable title was that it must be fairly deducible from the record and be supported by a connected chain of transfers, each of which was adequate and adequately dem-

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5. The terms, clear title, good title, and merchantable title, or marketable title, are synonymous; 'clear title' meaning that the land is free from incumbrances, 'good title' being one free from litigation, palpable defects, and grave doubts, comprising both legal and equitable titles and fairly deducible of record. *Ogg* v. *Herman*, 227 P. 476, 477, 71 Mont. 10.

"A good title means not merely a title valid in fact, but a marketable title which can again be sold to a reasonable purchaser, or mortgaged to a person of reasonable prudence as a security for a loan of money." *Irving* v. *Campbell*, 24 N. E. 821, 822, 121 N. Y. 353, 8 L. R. A. 620; *Moore* v. *Williams*, 22 N. E. 233, 234, 115 N. Y. 586, 5 L. R. A. 654, 12 Am. St. Rep. 944; *Emmens* v. *St. John*, 29 N. Y. S. 655, 657, 79 Hun. 102.

6. The principles involved have been stated in a variety of ways. These have been combined in 66 C. J., § 534, pp. 862-4, where it is said: "The term 'marketable title' is difficult of definition, but, accepting the prevailing rule that a good title is a marketable title, a 'clear title,' 'merchantable title,' or 'marketable title' generally means a title which consists of both the legal and equitable title, and is free from reasonable doubt in law or in fact; not merely a title valid in fact, but one which can be readily sold to a reasonably prudent purchaser, or mortgaged to a person of reasonable prudence as a security for the loan of money; a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear on such transactions, be willing and ought to accept; a title of such character as should assure to the purchaser a quiet and peaceable enjoyment of the property; an unencumbered title; a title that is not only good, but indubitable; a title which is clear, free from litigation, free from material defects, or from palpable defects, and grave doubts; a title free and clear from material encroachments, easements, and of all valid claims, outstanding interests, liens, and encumbrances whatsoever; ordinarily nothing less than a legal estate in fee, an estate indefeasible. A title subject to restrictive covenants is generally unmarketable, regardless of whether the restrictions are beneficial or not, as where there is a possibility of a reverter under such a covenant, unless the contingencies on which the reverter is to take effect are so improbable or remote that they may be disregarded. Whether a title is marketable is a question for the court."

onstrated by the record.[7] In later years a number of factors have influenced legal and public opinion concerning the suitability of the test of traditional marketability. The country has grown older, some sections have developed techniques for judging titles which differ from those formerly used, the volume of real estate transfers has increased, and real estate title chains have lengthened to cover long periods of time between the original grant and the present. As a result, there has been reconsideration of a number of questions, such as the period of time to be covered by a title search, the weight to be given to many kinds of imperfections of differing degrees, which inevitably creep into conveyancing, the kind of evidence of title which proves locally satisfactory to those who put their funds into real estate and who are concerned with the unquestioned right of possession and ability to dispose of their realty and have its title freely accepted by purchasers and mortgagees. As a result, the original pure doctrine of merchantable title deducible from the record, as it was applied by the courts in a former day to a simpler economy than that which now exists, like many other principles of law, has had to yield somewhat to the pressure of commercial development and local practices.[8]

Under the marketable title rule an examining lawyer always has had to take a most conservative view as to even minor imperfections which render a title less than perfect of record. For his own protection as against subsequent examiners, he must raise every minor imperfection and insist upon its elimination, by litigation if necessary. Otherwise he could expect that one day an irate nonunderstanding client would confront him with the circumstance that a subsequent examiner for a prospective purchaser refused to permit consummation of a sale unless and until the imperfection be removed, or, worse still, rejected the proferred title because of it, even though it had

7. In *Bear* v. *Fletcher* (1911), 252 Ill. 206, 96 N. E. 997, the court said at page 214: "* * * Appellant, apparently, loses sight of the distinction between a contract to furnish a perfect title of record or to furnish an abstract showing a perfect title, and a general agreement to convey a good merchantable title. Where the language of the contract requires the vendor to furnish the vendee with a perfect record title and an abstract showing the same, the purchaser will not be required to accept a title dependent upon adverse possession, since a good title of record is of a higher character and more desirable than one dependent upon extrinsic circumstances to be established by parol evidence. (Waterman on Specific Performance, 553; *Morgan* v. *Smith, supra; Attebery* v. *Blair*, 244 Ill. 363.)"

8. Report of Committee on Acceptable Titles to Real Property, American Bar Association Section of Real Property, Probate and Trust Law, *Proceedings*, September 1952, p. 27.

little merit. The necessity of raising unessential imperfections as objections is a serious burden which brings lawyers into disrepute with their clients and causes them much inconvenience and trouble. More important, it causes their clients delay, vexation and the expenditure of what they consider to be uncalled for sums for attorneys' fees and court costs in litigation required to eliminate objections which may hold no real threat but which will in turn be raised by every subsequent examiner for his own protection rather than that of his client.[9] In an urban economy, where business men are accustomed to the directness, simplicity and assurance of conducting large commercial and credit transactions according to the customs of the Stock Exchange and the banking world, these practices have developed irritation and a demand for principles and procedures more analogous to those applicable to personalty. These pressures, added to the similar feelings of many lawyers, have resulted in attempted remedies of several kinds.

It is the exceptional title that measures up to the standard of perfection. Under present law, as applied to many titles, there is no certainty as to marketability short of a decision of a court of last resort in litigation testing out the question as to whether or not a contract purchaser can be compelled to accept a title in spite of flaws which his counsel may cautiously raise. The reported cases show many illustrations of this, varying from judicial comment about "mere quibbles and pecadilloes which the ingenuity of counsel can raise against a title"[10] to a holding that "Courts of equity have at times declined to compel a purchaser to accept title which, though questionable, the court believed to be good, on the ground that its conclusion would not be binding upon persons who are not parties to the immediate action."[11]

What makes a title unmarketable?

The imperfections which will cause a title to be considered unmarketable are legion.[12] In an effort to bring into some kind of

9. Paul E. Basye, "Streamlining Conveyancing Procedure" (1949), 47 Mich. Law Rev. 935, 1097.

10. *Peatling* v. *Baird* (1950), 168 Kan. 528, 213 Pac. 2d 1015, 1019.

11. *Hardy* v. *Johnson* (1951), 12 N. J. Sup. 268, 79 Atl. 2d 500, 502.

12. Questions concerning marketability of title have been the source of much litigation. An annotation of the cases on marketability appearing in 57 A. L. R. 1253, and written twenty-odd years ago, covers over four hundred pages. It contains 957 point citations to New York cases, 286 to New

focus the problem of what kinds of practical situations result in litigation over this vexatious question, an examination has been made in a single state of all of the reported cases in which problems of marketability of title have been involved and the following charts have been prepared. The state is Illinois. The cases largely involved urban realty.[13] However, the survey made includes all cases arising in rural areas as well, for no clear distinctions appear in them as arising out of the location of land in urban or rural communities. There have been 71 such cases in the history of the State.

The application of the pertinent general principles to the infinite variety of facts presented by the cases has resulted in the courts deciding each case on its own facts.

Jersey cases, and 194 to Massachusetts cases. Another lengthy collection of such cases is set forth in 24 A. L. R. 2d 1306.

New York has a particularly troublesome problem of marketability because of stoops, loading platforms, fences, and party walls in an old and closely built up city. It has an unusual amount of law, case law, City ordinances and statutory provisions, concerning what are permissible encroachments and what are encroachments of such serious character as to render a title unmarketable. *Jennings* v. *Baumann*, 212 N. Y. S. 334, Affrd. 243 N. Y. 532; *Ravine Point Corp.* v. *Knott*, 254 N. Y. 580; § 38 (a) General City Law; § 82d6-7.0 Administrative Code; § 992 Civil Practice Act; *Stokes* v. *Johnson*, 57 N. Y. 673; *Harrison* v. *Platt*, 54 N. Y. S. 842, affrd. 158 N. Y. 712, etc., etc.

13. According to the 1950 census, Illinois then had a total population of 8,712,176. Of this 6,759,271 was classified as living in 258 urban places. The percentages involved are: urban 77.6, rural 22.4.

Chart 10 reveals what questions were involved in the cases and the number of times and the points on which titles have been held unmarketable, or marketable, as the case may be. The points have been many, but, of course, the chart is confined to the cases actually in the books in Illinois and does not begin to reveal all of the possible points which can be raised in litigation of this character or the points which have been passed upon in other jurisdictions. Probably the most significant items shown by this chart are that absence of a connected chain of title is the largest single cause for titles having been held unmarketable and that the cases fall into two general groups, the smaller of which relates to what might be termed "basic marketability" involving a connected chain of title, and the larger of which involves "incidental marketability" arising out of encumbrances, restrictions, encroachments, easements, and defects less serious than absence of a connected chain of title.

POINTS AND NUMBER OF CASES ON EACH POINT WHERE TITLE WAS HELD MARKETABLE OR NOT MARKETABLE

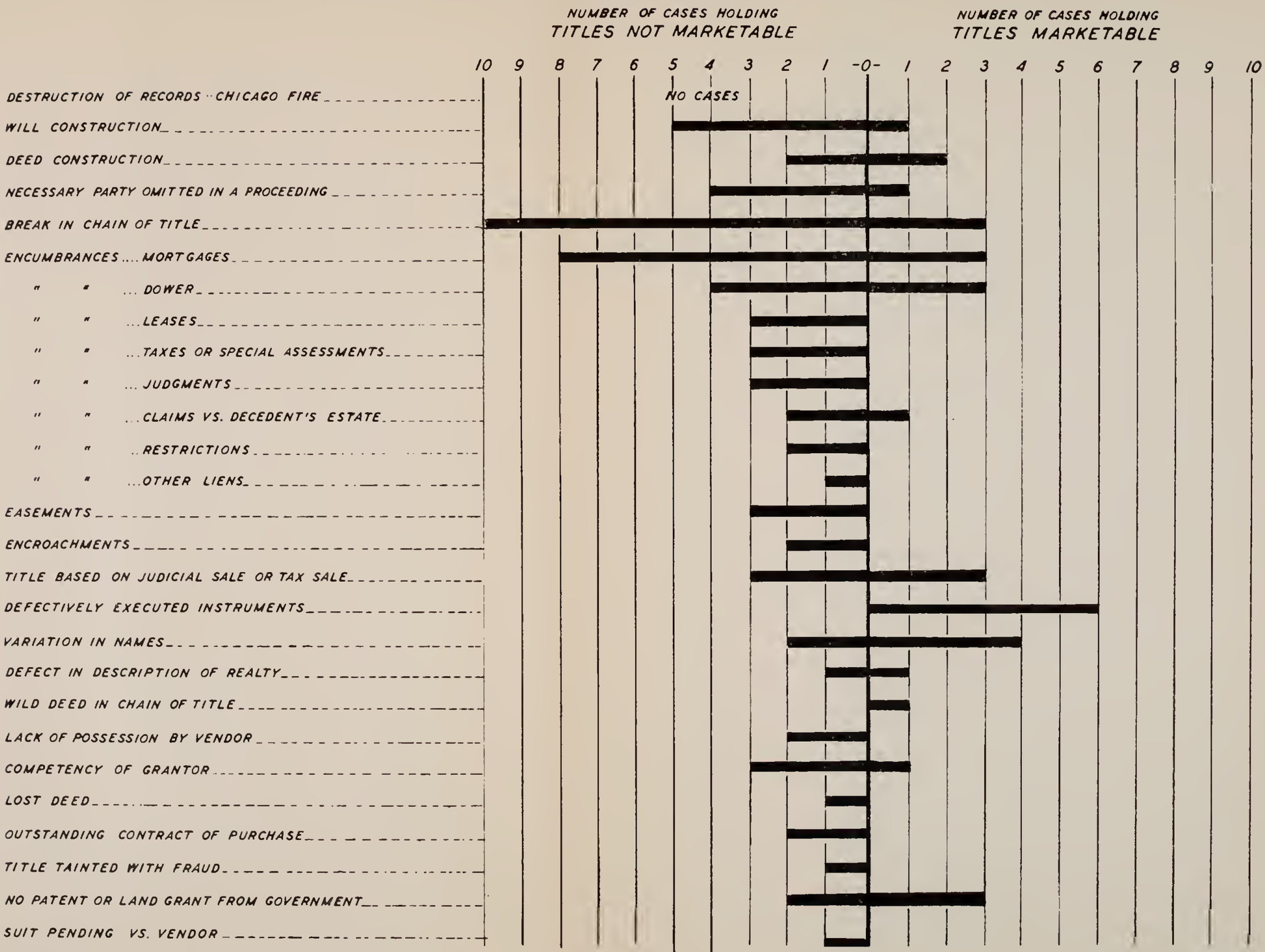
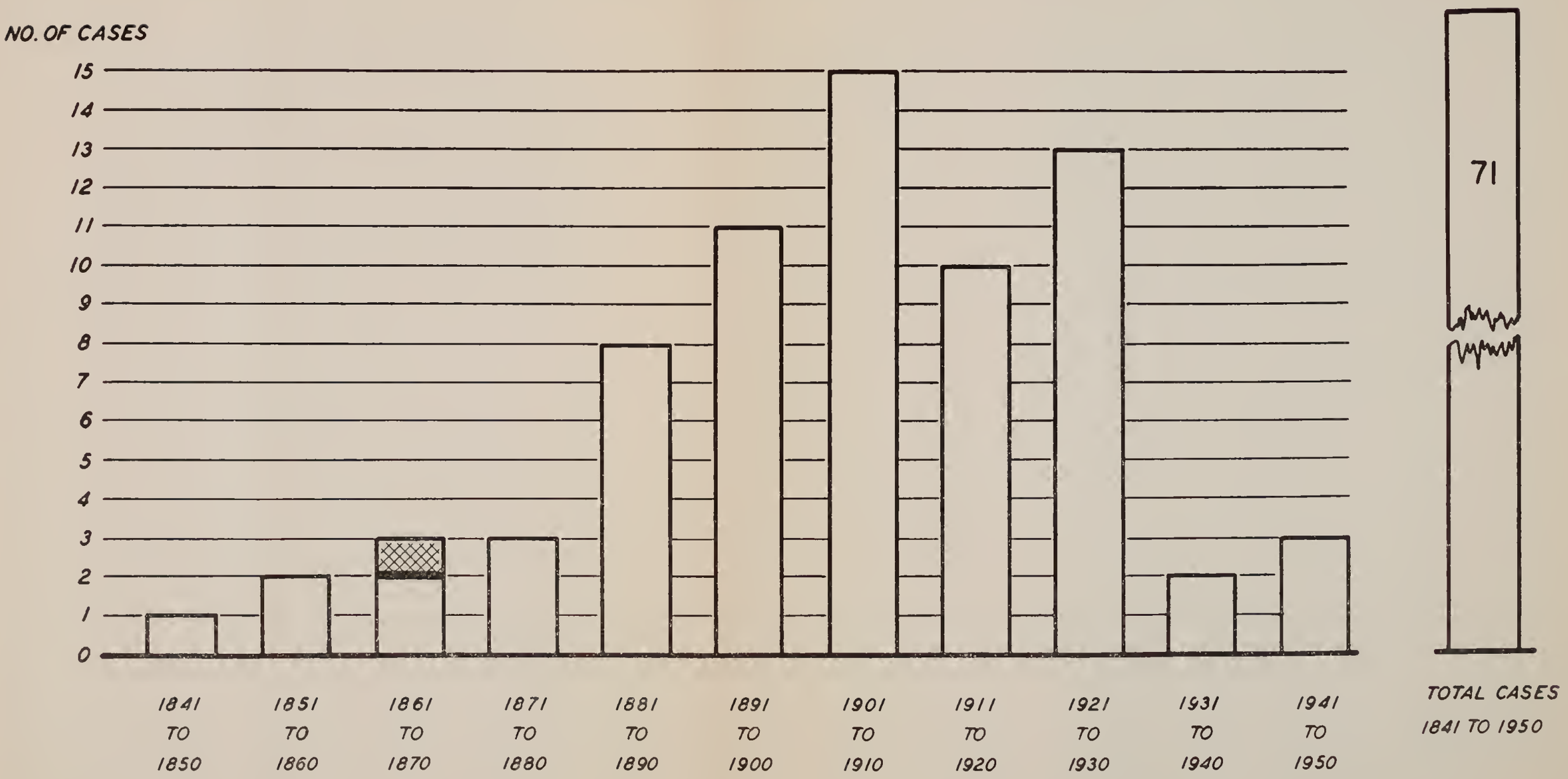


CHART 10

Chart 11 indicates the decades in which the cases were decided. Greatest activity occurred from 1880 through 1930. The last twenty years have had only five cases. During that period there has been a great increase in the cities of Illinois of the use of title insurance and the custom of using contract provisions making insurability the test of a title, so doing away with differences of judgment as among title examiners to what specific situations need be raised in an opinion of title. These statistics of course do not disclose how many cases there have been in trial courts where no appeal was involved, but it seems likely that there is some fairly constant relationship between the number of cases in trial courts and the number in upper courts.

NUMBER OF CASES IN ILLINOIS SUPREME AND APPELLATE COURTS INVOLVING MARKETABILITY OF TITLES, FROM 1841 TO 1950

GROUPED BY TEN YEAR PERIODS.



U.S. SUPREME COURT CASE WHICH AROSE IN ILLINOIS

CHART 11

Chart 12 indicates that questions of marketability are sufficiently complex so that the lower and the upper courts frequently differ in their views, although the trial courts have been sustained more often than they have been reversed.

STABILITY OF TRIAL COURT JUDGMENTS AND DECREES ON QUESTIONS OF MARKETABILITY

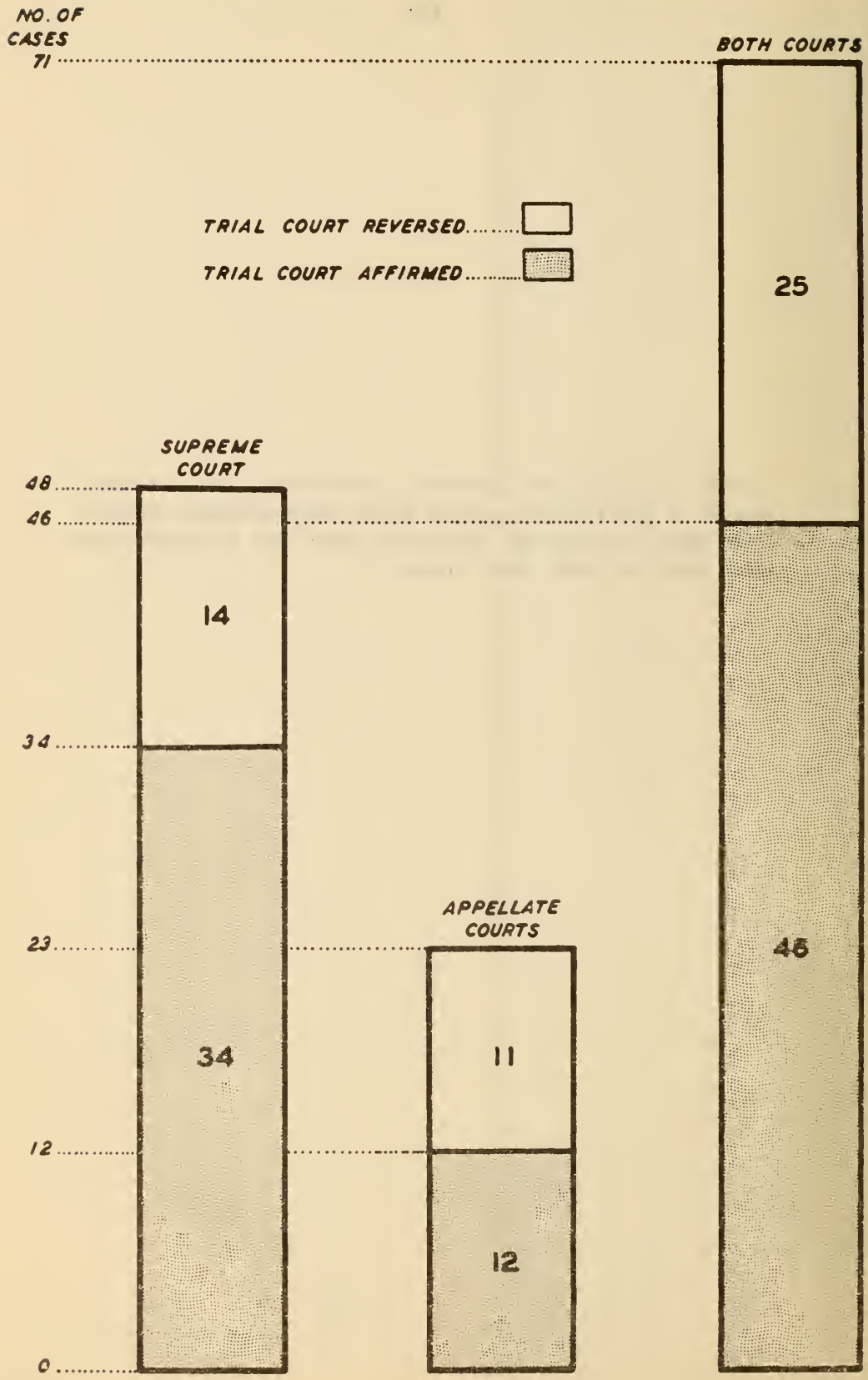
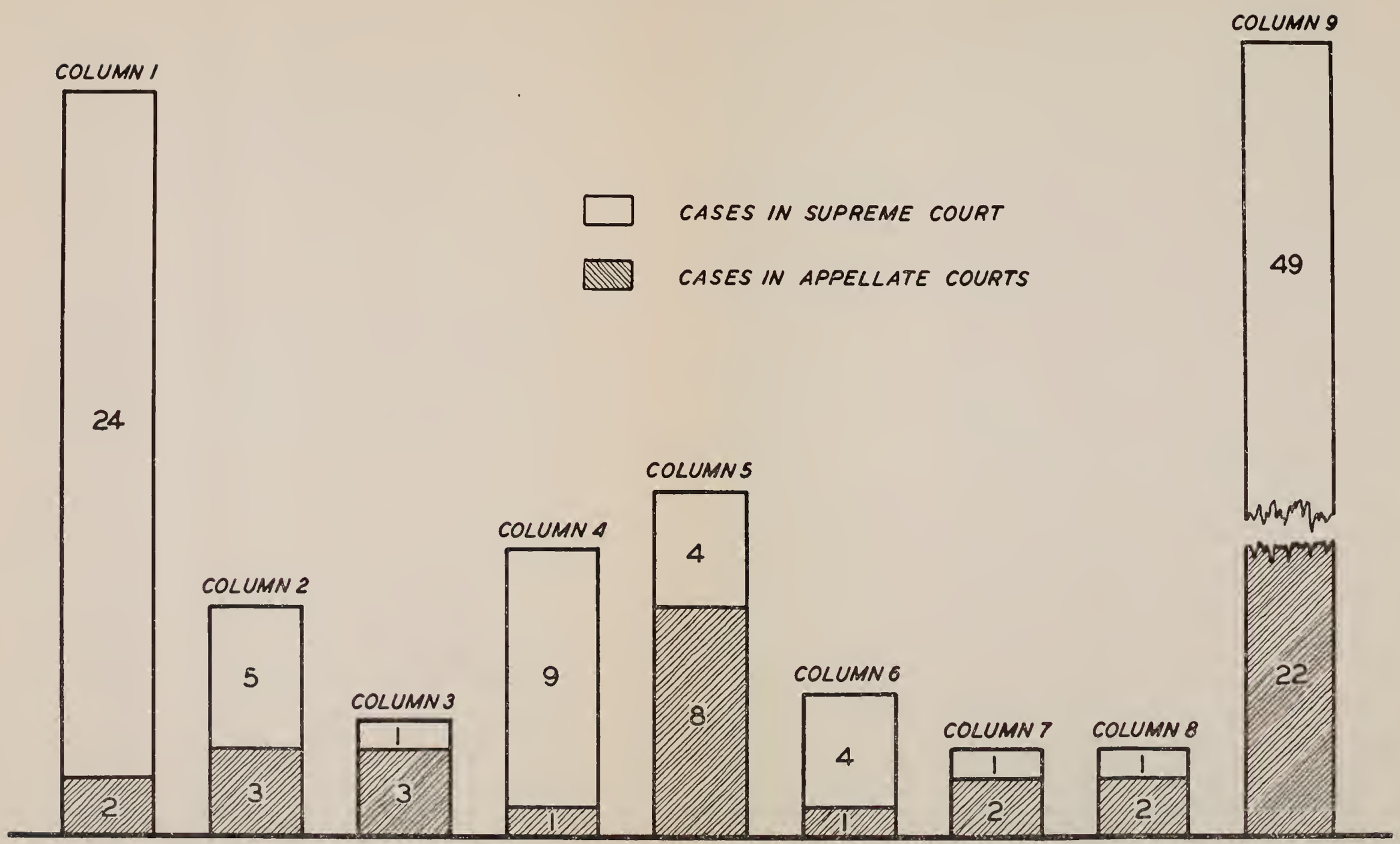


CHART 12

Chart 13 discloses the types of suits in which the question of marketability has been raised. As would be expected, the question has most often arisen in specific performance cases brought by contract sellers against persons who had agreed to purchase but who had thereafter rejected the titles tendered them as not marketable.

TYPES OF SUITS AND NUMBERS OF EACH TYPE IN ILLINOIS SUPREME AND APPELLATE COURTS INVOLVING MARKETABILITY OF TITLES



COLUMN 1 .....SPECIFIC PERFORMANCE BY VENDOR
COLUMN 2 .....SUIT BY VENDOR FOR PURCHASE PRICE
COLUMN 3 ..... SUIT BY VENDOR FOR DAMAGES
COLUMN 4 .....SPECIFIC PERFORMANCE BY VENDEE
COLUMN 5 ..... SUIT BY VENDEE FOR RETURN OF EARNEST MONEY
COLUMN 6 .... SUIT BY VENDEE FOR DAMAGES FOR BREACH OF CONTRACT
COLUMN 7 .....INTERPLEADER SUITS BY THIRD PERSONS.
COLUMN 8 ..... MISCELLANEOUS ACTIONS
COLUMN 9 ..... TOTAL OF ALL TYPES OF ACTIONS

CHART 13

Chart 14 is particularly significant. It illustrates that, in litigation sufficiently serious to get to the upper courts, titles were held not marketable much more often than they were held marketable. Apparently, so far, there has been no appreciable softening of the ancient rules of law as to what is a marketable title and no particular inclination on the part of the Illinois courts to require purchasers to accept titles which they litigated about.

CASES IN SUPREME AND APPELLATE COURTS WHERE TITLES WERE HELD MARKETABLE OR NOT MARKETABLE

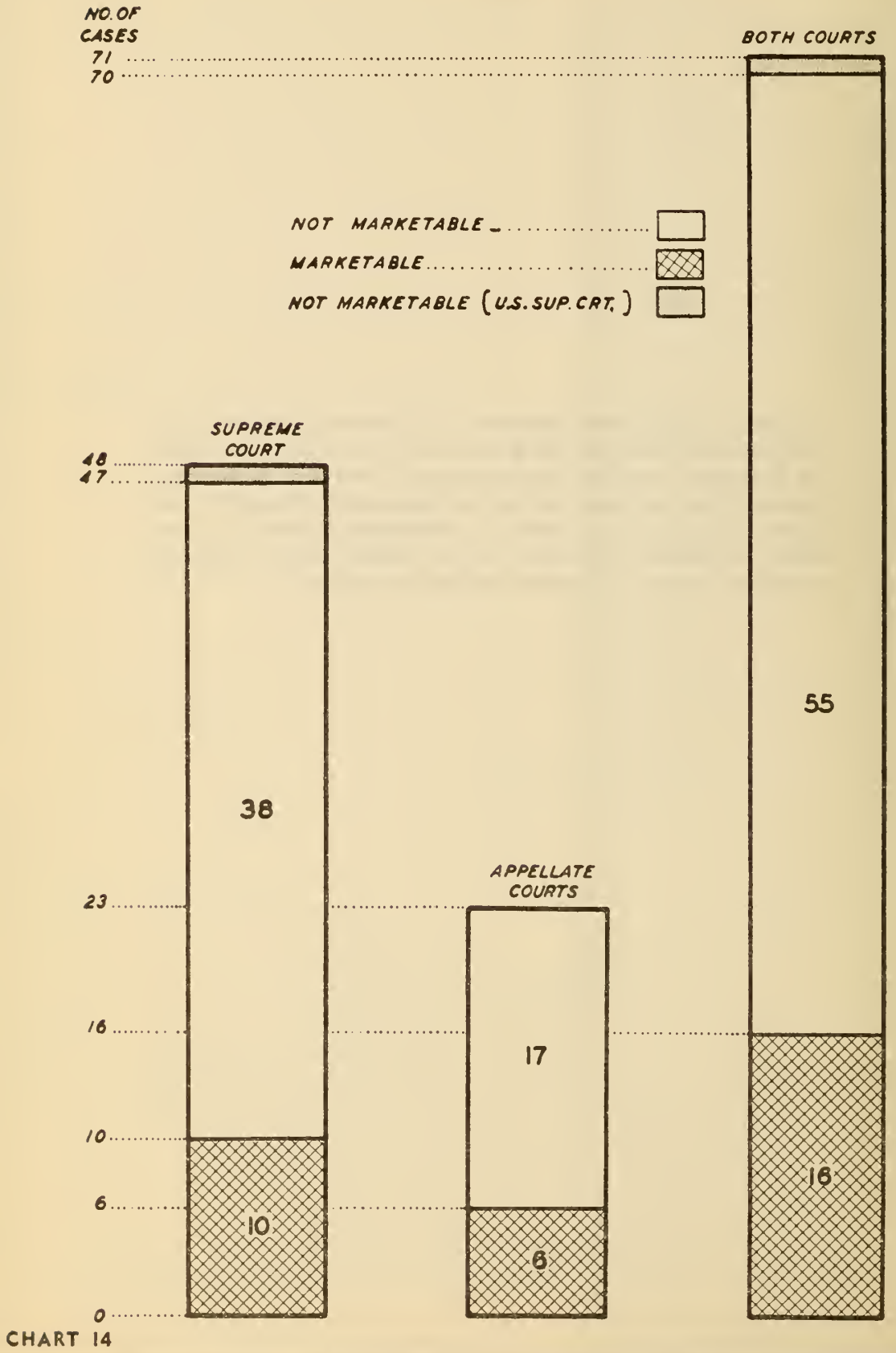


CHART 14

The remedies which have been evolved

To facilitate real estate transactions and meet the difficulties inherent in the full re-examination of title upon every sale or mortgage of land, four types of remedy have been evolved: (1) legislation; (2) agreements among title examiners as to common procedures and attitudes toward title objections; (3) contract provisions for an insurable, as distinguished from a marketable, title; and (4) title registration under the Torrens System.

—Legislation

Some phases of the problem of what constitutes an acceptable title to real estate are reflected in legislation of fairly recent origin.[14] In 1945, Michigan adopted a "Marketable Record Title Act," which provides in substance that an owner in possession "who has an unbroken chain of title of record for 40 years, shall at the end of such period be deemed to have a marketable record title to such interest, * * *."[15] Whether such a conclusion is judicial opinion or is within the realm of the legislative branch of the State Government remains to be seen.[16] This so-called "Marketable Record Title Act" is in addition to many other Michigan acts designed to simplify title examinations.[17] South Dakota adopted a similar Marketable Record Title Act in 1947. It purports to be applicable to chains of title starting January 1, 1920.[18] South Dakota has passed numerous other acts designed to cure defects in record titles by lapse of time[19] as well as "an act providing that certain acts therein enumerated shall not be necessary in order to make a real

14. John C. Payne, "Increasing Land Marketability Through Uniform Title Standards," 39 Va. Law Rev. 1, (1953).

15. Mich. 1945 Sess. Laws, p. 267, as amended in 1947 Sess. Laws, p. 156, Mich Stat. Ann. § 26.1271; Ralph W. Aigler, "Clearance of Land Titles—A Statutory Step" (1945), 44 Mich. Law Rev. 45.

A detailed analysis and summary of the Marketable Title Acts of Iowa, Illinois, Indiana, Wisconsin, Minnesota, Michigan, South Dakota, Nebraska and North Dakota has been made by Prof. Paul E. Basye of Hastings College of Law, San Francisco. It is appended as Appendix "C" to the Report of the Committee on Acceptable Titles to Real Estate of the American Bar Association's Section of Real Property, Probate and Trust Law, August 1953.

16. Ralph W. Aigler, "Constitutionality of Marketable Title Acts" (1951), 50 Mich. Law Rev. 185.

17. Mich. Stat. 26.595, 596, 26.527, 26.581, etc.

18. S. Dak. 1947 Sess. Laws, pp. 273, *et seq.*

19. 1943 Sess. Laws, pp. 197-8.

estate title merchantable or marketable."[20] Wisconsin, among other statutes aimed at curing difficulties of marketability, has an act relating to a thirty-year chain of title as the basis of a marketable title for a purchaser for value.[21] Minnesota has a statute which bases marketable title on a forty-year chain of title.[22] Indiana has a similar statute based on a fifty-year chain.[23] Nebraska has legislation which adopts the standards established by the State Bar Association for the examination of abstracts of title, and through this means prescribes what are not meritorious objections to the merchantability of a title.[24] It also has a marketable title act similar to the Michigan act.[25] Colorado and Missouri are experimenting with the same type of solution.

The statutes of Vermont concerning investments by savings banks, trust companies and insurance companies recently have been amended to recognize title insurance as the equivalent of marketable title. The statute requires such real estate mortgage investments to

> "be supported by either evidence satisfactory to the bank that the title is marketable or a mortgagee's title insurance policy * * *."[26]

Two states, Kentucky and Vermont, recently have amended their statutes to recognize that title insurance is an acceptable means of overcoming defects in a title. Kentucky's insurance statute requires loans to be secured by mortgages on "fee simple, unencumbered, improved real property." Effective September 1, 1950, the statute was amended to provide that a number of elements which normally would cause unmarketability such as easements, joint driveways, current taxes, etc., are not to be considered as prior liens or encumbrances. In this category it includes:

> "Restrictions or conditions as to building, use and occupancy if there is not a right of re-entry or forfeiture for violation, or if there is protection against any such right of re-entry or forfeiture through a policy of title insurance."[27]

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20. 1945 Sess. Laws, p. 222.
21. 1941 Laws, Chap. 293; 1943 Laws, Chap. 109; 1945 Laws, Chap. 29.
22. 1947 Laws, Chap. 118, § 541.023.
23. 1947 Laws, pp. 632-6.
24. Nebraska Standards of Title Examination Act of 1947, Neb. Rev. Stat., §§ 76-601 to 76-644.
25. Neb. 1947 Sess. Laws, pp. 762, *et seq.*
26. Vt. Stat. 1947, § 8754.
27. Ky. Rev. Stat., § 304.433.

Vermont has the simplest test. By amendment passed in 1947, insurance company mortgages must be supported either by satisfactory evidence that the title is marketable or by a "mortgagee's title insurance policy" unless the principal of the loan is less than $1,000, in which case this requirement may be omitted.[28]

Many states now have amended their statutes of limitation to give them greater efficacy in eliminating old claims or even interests upon the basic theory that in the scale of social values certainty and marketability outweigh the giving of undue protection to the legally disabled.[29]

The Federal governmental agencies having to do with real estate mortgages do not use marketable title as a test of acceptable title but have based their operations on titles locally acceptable.[30]

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28. Vt. Stat. 1947, § 8754.

29. Paul E. Basye, "Streamlining Conveyancing Procedure," 47 Mich. Law Rev. 935, 948; Emerson G. Spies, "A Critique of Conveyancing," 38 Va. Law Rev. 245, 257.

30. The Home Owners' Loan Corporation made no requirement that titles be marketable.

The Federal Housing Administration's attitude is reflected in Section 8 of Article VI of its Regulations for Mutual Mortgage Insurance and Section 5 of Article V of the Regulations for War Housing Insurance under Section 603, both of which read:

"If the title and title evidence are such as to be acceptable to prudent lending institutions and leading attorneys generally in the community in which the property is situated, such title and title evidence will be satisfactory to the Administrator and will be considered by him as good and merchantable."

FHA makes no objection to a title tendered to it in exchange for debentures even where there are violations of cost or set-back restrictions which provide a penalty of reversion or forfeiture of title, and which therefore clearly make the title unmarketable, "provided a policy of title insurance is furnished expressly insuring the Administrator against loss by reason of such penalties." (Commissioner's Handbook Instructions, par. 1303.)

The Veterans' Administration started to operate under a regulation which provided that no loan "shall be eligible for a guaranty or insurance unless the veteran has or will become vested with a merchantable title * * *" (§ 36.4350 Regs. Title III Servicemen's Readj. Act of 1944, effective March 1, 1946, but by an amendment effective January 21, 1947, less than a year later, the requirement for merchantable title was deleted. The requirement now is for a title "which is such as to be acceptable to prudent lending institutions, informed buyers, title companies and attorneys, generally, in the community in which the property is situated * * *" (Reg. § 36.4325 (b), § 36.4350 (a) and § 36.4320 (h) (5)).

—Agreements among title examiners as to common procedures and attitudes toward title objections

In some parts of the country a solution has been sought by the device of securing agreements among lawyers who are members of state or local Bar Associations, as to what shall be considered to be proper objections to a title. As a consequence, a number of Bar Associations have developed so-called Rules for Title Examination, which in effect are codes of agreed practices concerning title defects.[31] Some of these, as in Connecticut, are state wide, elaborate and formal. Others are only county-wide in application. Their purpose is to excuse lawyers from liability for not raising every objection which might interfere with strict marketability. They are based upon the idea that if there is a uniform and common course of not raising inconsequential objections nobody will be hurt. Because of their unofficial character, and differences of legal views, not all lawyers are willing to rely upon them. And lack of unanimous agreement renders them largely ineffective.

In Iowa, the Supreme Court recently decided a marketable title case on the authority of a standard set up by the Title Standards Committee of the Iowa State Bar.[32] South Dakota has done likewise.[33] And in Nebraska the Supreme Court set aside its first opinion in a case, granted a rehearing and reversed its earlier ruling to achieve the result indicated by one of these title standards.[34]

—Contract provisions for an insurable, as distinguished from a marketable, title

Not all of the influences of the metropolis on the concepts, rules and institutions relating to property are found in legislation or are disclosed by the reports of courts of last resort. Some are found in day-by-day procedures in the commercial world.

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31. John C. Payne, "Increasing Land Marketability Through Uniform Title Standards," 39 Va. Law Rev. 20. The author lists 17 states in which such standards exist. See also, Paul E. Basye, "Streamlining Conveyancing Procedure," 47 Mich. Law Rev. 935, 945, note 25, (1949).

32. *Siedel* v. *Snider* (1950), 241 Ia. 1227, 44 N. W. 2d 687, citing "Iowa Land Title Examination Standards (1950), pages 47, 48, problem 9.18."

33. *Grand Lodge* v. *Fischer* (1945), 70 S. Dak. 562, 21 N. W. 2d 213.

34. *Campagna* v. *H. O. L. C.* (1941), 140 Neb. 572, 300 N. W. 894, reversed on rehearing (1942), 141 Neb. 429, 3 N. W. 2d 750.

In many sections of the country by common custom among lawyers, their clients and real estate brokers, the generally used contracts for the sale of real estate have become silent on the question of marketability. They substitute in its stead the willingness of a named title insurance or guarantee company to issue its insurance policy, either in the first instance or as a cure for objections which may be raised by the purchaser's attorney upon the examination of an abstract of title. Such contract provisions have become common in the cities of New York, California, Illinois, Pennsylvania, New Jersey and Washington.[35]

This practice is based upon the present day concept that to be commercially acceptable a real estate title need not be flawless of record provided it is basically sound and the owner is protected by title insurance in his enjoyment of the property, against loss, and against the trouble, expense and the results of any attack upon his title.

By this practice a sound title which is subject to defects which prevent it from being technically marketable is nevertheless made commercially acceptable where it is not subject to being defeated, is defensible and insurable and in fact is covered by a title guarantee policy of a kind which is generally acceptable to purchasers and mortgage lenders. As a matter of commercial usage, a title of this quality is one which can be readily sold to a reasonably prudent purchaser, or mortgaged to a person of reasonable prudence as security for the loan of money. Many titles which do not meet the test of true legal marketability nevertheless are sound in spite of the defects which render them technically unmarketable, and being sound are defensible and insurable, and so long as they are protected by a suitable title policy are saleable and acceptable to purchasers and lenders. In effect, contract provisions of this type make insurability the final test in the com-

35. A recent Pennsylvania case involved a contract obligation to furnish a title that should be "good and marketable and such as will be insured * * * by any responsible title insurance company." The case involved a title policy issued by the Commonwealth Title Company of Philadelphia, which set up a valid objection not contemplated by the contract. It was held that the purchaser was justified in refusing the proffered title. (*LaCourse* v. *Kiesel* [1951], 366 Pa. 385, 77 Atl. 2d 877, 881). Another Pennsylvania case involved a contract calling for a title "to be good and marketable and such as will be insured at regular rates by Land Title and Trust Company." (*Butler* v. *Santosus* [1948], 62 York 31). And a recent New Jersey case involves the same type of contract provision, (*Brinn* v. *Mennen Co.* [1949], 5 N. J. Sup. 582, 68 Atl. 2d 879, 882), as does a Washington case (*Hebb* v. *Severson* [1948], 32 Wash. 2d 159, 201 Pac. 2d 156, 160).

munity of the acceptability of title. Such an arrangement obviates the many and vexatious questions associated with marketability which heretofore have plagued lawyers, real estate men and sellers.[36]

One of the important results of this practice is to broaden the base for lending transactions and sales of real estate by making it possible for mortgage lenders safely to accept as collateral, or for purchasers to accept without concern, not only perfect titles and marketable titles, but also those titles which are subject to defects which render them technically unmarketable, provided they still are sound, defensible and insurable.

—Title Registration Under the Torrens System

A peculiarly urban effort to make titles more attractive is furnished by the Torrens System. Between 1897 and 1917, nineteen states adopted statutes authorizing the registration of land under the Torrens System and one additional state adopted a constitutional amendment authorizing such legislation but never went further. No other state has adopted a Torrens act since 1917. Four states subsequently repealed their Torrens statutes, four made negligible use of them and five more very slight use.[37] There are 3,072 counties in the United States. In only 33 counties located in the states of California, Illinois, Massachusetts, Minnesota and Ohio has it ever become a factor in establishing or evidencing an acceptable title to real estate and there in only a minor per cent of the possible cases.[38] In most counties the statute does not permit withdrawal once registration is complete. In 1950, California changed its law to permit withdrawal from the System.[39]

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36. *Wilson* v. *Pacific Coast Title Ins. Co.* (1951), 106 Cal. A. 2d 599, 235 Pac. 2d 431; and *Hocking* v. *Title Ins. & Trust Co.* (1951), 37 Cal. 2d 644, 234 Pac. 2d 625; *Foehrenbach* v. *German-Am. T. & T. Co.*, 217 Pa. St. 331, 66 Atl. 561, 563; *King* v. *Stanley* (1948), 32 Cal. 2d 584, 197 Pac. 2d 321.

37. Richard R. Powell, *Registration of the Title to Land in the State of New York* (1938), p. 54.

38. A report of the American Bar Association Real Property, Probate and Trust Law Section's Committee on Acceptable Titles to Real Property, as of August 1953, noted the system as being a factor "to a very limited degree * * * in Los Angeles County," about 17% in number (but not value) of transfers in one county in Illinois; in the eastern counties of Massachusetts, including Boston, about 5%; in the cities of Minneapolis, St. Paul and Duluth, about 20%; and in the New York area about 10% of Suffolk County transactions; and in Ohio and Washington a negligible use.

39. Deering's Cal. Gen. Laws, Act 8589 §§ 48.1-48.9.

CHAPTER NINE

LEASES, LAND TRUSTS, AIR RIGHTS, AND CO-OPERATIVE APARTMENTS

Problems of land use

In general the problems of land use in cities have been met through adaptation of established legal principles to situations which have developed under metropolitan need for more intense use of land. As soon as it became apparent that not all situations can be adequately met by having the owner of land improve it with a building, various solutions evolved. Without attempting to review the whole field of the techniques employed in joint uses of land and the establishment and conveyance of joint rights in realty, four illustrations will be touched upon: leases, land trusts, utilization of air rights, and co-operative apartments.

Leases

Like other phases of the law, the legal relationship existing between landlord and tenant has felt the pressure of city living, for, in every sizable city, a multitude of people constantly come under the direct influence of that branch of the law. The net result has been that over the years the traditional autocracy of the hardhearted landlord has been modified by principles of law which are responsive to the needs and wishes of the multitude of tenants who inhabit city apartment houses and do business in rented stores, factories and offices.

In the area of State legislation, this has been accomplished by statutes covering many aspects of the problem. Some of these concern the creation and termination of the landlord-tenant relationship, the necessity of written leases, and requirements for the giving of notices a fair period in advance of the date of termination. Others concern rent control, which has hereinbefore been discussed.[1] evictions, prohibition of the exclusion of children in rented residential accommodations, and special treatment of leases which involve the granting of rent concessions. In the area of municipal legislation, the chief emphasis has been upon laws concerning such practical items as the obligation to keep rented buildings repaired and in

1. See Chapter VI, *ante*.

safe and healthful condition, and conforming to municipal requirements designed to decrease the hazards of fire and other calamities.

In the judicial area, there have been problems of commercial frustration, where premises were leased for limited specified purposes and governmental acts or regulations and restrictions have prohibited or seriously interfered with such use.[2] The courts have been busy adjudicating rights of many kinds arising out of situations as varied as the commercial life of the metropolis. Decisions have been concerned with tenancies of uncertain duration, constructive eviction, assignments of leases, renewals, extensions, trade fixtures, options, subletting of the demised premises, destruction of or serious damage to leased buildings and buildings in which leased premises are located, the effect of condemnation of leased premises, both as to the rights and obligations under the lease and the award of damages involved, and the relative rights of mortgagee and lessee upon foreclosure of a mortgage upon the leased realty.[3]

Agreements between landlord and tenant have kept pace with other urban commercial developments. Rentals frequently are agreed upon according to formulae. They may be related to some percentage of the lessee's sales or profits. They may be adjustable through escalator clauses, which attempt to maintain some relationship between rents and other economic factors or through provisions for periodic adjustments to accord with future valuations of the premises.

—Long-term leases

Long-term leases with payment of ground rents and construction of buildings by the tenant have become common in the larger

2. *Colonial Operating Corp.* v. *Hannan Sales & Service, Inc.* (1942), 34 N. Y. S. 2d 116 (1943), 39 N. Y. S. 2d 217; *Signal Land Corp.* v. *Loecher* (1942), 35 N. Y. S. 2d 25; *Schantz* v. *Am. Auto Sup. Co., Inc.* (1942), 36 N. Y. S. 2d 747; *Byrnes* v. *Balcom* (1942), 38 N. Y. S. 2d 801; *First Natl. Bk. of New Rochelle* v. *Fairchester Oil Co.* (1943), 45 N. Y. S. 2d 532; *Megan* v. *Updike Grain Corp.* (1938), 94 Fed. 2d 551; *Johnson* v. *Reeves* (1910), 133 Ga. 822, 66 S. E. 1081; *Heart* v. *E. Tenn. Brg. Co.* (1908), 121 Tenn. 69, 113 S. W. 364; *Houston Ice & Brewing Co.* v. *Keenan* (1905), 99 Tex. 79, 88 S. W. 197.

In England a statute was enacted defining the rights of landlord and tenant where leased premises were destroyed or damaged by enemy action. Landlord and Tenant (War Damage) Act, 1939, 2 & 3 Geo. VI, c. 72. For its scope and effect see Comment in 52 Yale L. J. 130 (1942).

3. See *1949 Annual Survey of American Law*, New York University School of Law, Chapter on Landlord and Tenant, by Arad Riggs, p. 759, *et seq.*, for a discussion of the significant cases in this area which were decided in a single year.

cities.[4] Where this device is used, numerous complicated legal relationships result. In a large project of this type, property rights become split up and diversely held. Different individuals or groups may own the fee, mortgages on the fee, the basic leasehold, corporate shares in different corporations which hold various interests, leases from the basic lessee to the tenants of a building which is constructed on the land by the lessee, subleases by the tenants, and frequently a mortgage on the leasehold estate.[5] Sale of the underlying fee or sale of the building by the basic lessee involves intricate, technical, and coordinated legal procedures. There have to be necessary conveyances of rights under the parent lease, assignments of rights under the building leases, transfers of corporate shares, the giving of notices and holding of required meetings of directors and shareholders of the various corporate entities involved, the preparation of new mortgages and the paying off and releasing of old mortgages, the examination and clearing of titles, and the securing of satisfactory evidence of title. So complicated do these larger metropolitan real estate deals become that the sale and conveyance of such buildings as the Empire State Building and the Chrysler-Graybar group of buildings receive wide comment in the public press. Even the weekly picture magazines emphasize the money involved, the great number of documents required and the diverse interests which are affected and are represented by counsel. Because of important, recent and well publicized transactions of this kind, the abundance of existing literature on the subject, and the fact that while such transactions involve many details, they still involve the same principles which are encountered in real estate transactions of lesser amounts and complexity, this manifestation of metropolitan influence is not further pursued.

4. Witness the improvement of Rockefeller Center, under which most of the land is owned by Columbia University.

5. "Modern long term building leases, such as are used extensively in large American cities, came into general use from 1870 to 1880 and differed from earlier land leases, inasmuch as the lessee obligated himself to improve the leased property with suitable buildings within a given period, thereby enhancing it in value. These more modern leases also required the lessee to furnish bond that he would not only pay his rent promptly, but also would live up to his building covenant when the time came due for its enforcement.

"The application of the ninety-nine year lease in developing urban communities is still in its infancy, being practiced in but few of the larger cities of the United States and Canada. It is certain to see a big expansion within the next few years. Cities having a population of twenty-five or thirty thousand people upwards are now giving attention to this means of building up business districts."

McMichael, *Long and Short Term Leaseholds* (1923), p. 14.

Land trusts

A distinctively urban solution of some of the problems of holding title to city realty is found in land trusts. To meet some urban conditions and situations, these have become popular within fairly recent times. The creation of a land trust, its operation, and the ultimate conveyance of the realty involved, all employ the use of settled principles of contract law and of trust law. In summary, where this method is employed, title to realty is vested in a corporate trustee under the terms of a deed in trust and an unrecorded trust agreement while actual management and control of the realty so held is enjoyed by undisclosed beneficiaries of the trust. Among other things the deed in trust and trust agreement provide powers to the trustee which, in so far as third persons are concerned, are adequate to enable it to do all of those things which normally an owner holding title in his own name could do. In addition they provide that the trustee will deal with the title to the real estate only upon the direction of persons named in the agreement, whose names, however, are not disclosed by the public record. Under the arrangement, both the legal and equitable titles to the realty are vested in the trustee,[6] while the rights and conveniences of ownership are exercised by the beneficiary of the trust, whose interest likewise is not disclosed of record. The beneficiary of such a trust may be an individual. Or the beneficiaries may be a group of persons such as those interested in one building, a syndicate marketing a subdivision by means of installment sales, or an unincorporated professional group which lacks legal capacity to hold title to realty, or builders of many small homes.

The vesting of title in the trustee, affords convenience and protection both in the holding of title and in the execution of deeds to individual purchasers. Frequently, the trust arrangement vests in a manager for the beneficiaries the authority to direct the trustee concerning the execution of deeds, contracts, and mortgages, which from time to time may be required. Management of the realty, collection of rents, collections of installments due under sales contracts, payment of taxes and insurance, and all such matters thereby are reserved to the beneficiaries of the trust.[7] Under carefully

6. *Aronson* v. *Olsen* (1932), 348 Ill. 26.

7. *Beilin* v. *Krenn & Dato, Inc.* (1932), 350 Ill. 284; *Drexel State Bank* v. *O'Donnell* (1931), 344 Ill. 173; *Crawford Corp.* v. *Woodlawn Bank* (1943), 382 Ill. 354, 360.

prepared forms of deed in trust and trust agreement of this type, the interest of the beneficiary is specifically provided to be personalty which may be assigned with less formality than is required in the execution of a deed.[8] A mortgage of realty so held may by its terms limit recovery to the realty pledged, without personal liability being assumed by any of the parties to the transaction.

In connection with city realty in particular, such an arrangement frequently affords a number of advantages: privacy of ownership, escape from the problems which arise under some forms of multiple ownership when one interested person dies, simplicity in the holding and conveyance of title, and freedom from some risks inherent in other types of joint ownership and control which arise out of human problems like divorce, litigation, judgments, and disagreements which might provoke partition suits.

Utilization of air rights

One interesting development of joint utilization of land has occurred where one uses most of the surface of the land and another has sufficient rights in the same tract to permit the construction of a foundation and on it a building which chiefly occupies the air above the land. Ordinarily this is accomplished by a conveyance of air rights accompanied by an appropriate conveyance of such rights in the underlying land as will permit the construction and maintenance of a building. Solutions of this type seem to be most common where the land involved is city land under use by a railroad. Frequently in such a case it is feasible to construct a building over the railroad right of way with foundation supports located between the existing tracks, leaving the surface use by the railroad substantially uninterfered with, and the bulk of the building occupying the air space above a suitable level to permit this. Railroads run under Park Avenue in New York. The Merchandise Mart, the Daily News Building, and the Prudential Building, now under construction, in Chicago, all have been built by utilizing air rights.

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8. *Duncanson* v. *Lill* (1926), 322 Ill. 528. See also *Whitaker* v. *Scherrer* (1924), 313 Ill. 473; *Sweesy* v. *Hoy* (1927), 324 Ill. 319; *The People* v. *Village of Lombard* (1925), 319 Ill. 56; *C. N. S. & M. R. R. Co.* v. *Chicago Title & Tr. Co.* (1928), 328 Ill. 610; *Chicago Title & Tr. Co.* v. *Illinois Merchants Tr. Co.* (1928), 329 Ill. 334.

—The legal principles involved

Familiar legal principles and devices permit such a solution. The basic principles are the retention by the owner of the land of such rights of ownership and occupancy as permit its desired operations, and the conveyance in appropriate form of those rights which will permit the construction and maintenance of a foundation and supporting pillars to a given level above which a building can be erected to rest upon the foundation so constructed.[9]

In the law of real property it is a general principle that the owner of the fee simple estate in land also owns the space above it.[10] Originally this principle was expressed in the maxim, *cujus est solum ejus est usque ad coelum* (he who owns the soil or surface of the ground, owns, or has an exclusive right to, everything which is upon or above it to an indefinite height).[11] But aerial navigation has brought about essential modifications of this broadly stated gen-

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9. See *Air Rights* by Laird Bell, 23 Ill. Law Rev. 250 (1928) and *Subdividing the Air*, a new method of acquiring Air Rights by Herbert Becker, then Vice President of Chicago Title and Trust Company (1929). *The Creation of Estates in Airspace*, Barnhill, 25 Rocky Mtn. Law Rev. No. 3, p. 354 (1953).

10. *Corbett* v. *Hill*, L. R. 9 Eq. Cases 671 (1870); *Wood County Petroleum Co.* v. *West Virginia Transportation Co.*, 28 W. Va. 210 (1886); *Murphy* v. *Bolger, et al.*, 60 Vt. 723 (1888); *Metropolitan West Side Elevated Railroad Co.* v. *Springer*, 171 Ill. 170 (1897); *Murray* v. *Heabron*, 74 N. E. 2d 648 (1947). In *Piper, et al.* v. *Ekern, Atty. Gen.*, 180 Wis. 586, 194 N. W. 159 (1923), the court said: "The owner's right in property when unrestricted extends not only downward under the surface to an unlimited extent, but also upwards, and the latter right, from common experience, would appear to be the more valuable. In large cities, in congested business areas, the value of property consists almost exclusively in the right of the owner to erect business and industrial structures thereon, and the well-defined distinction appears from the authorities that the unrestrictable right in such localities to build to a considerable height is greater than in residential districts. Such rule seems to follow from the necessity arising out of the situation. * * Without such right to erect buildings to considerable height upon business areas, the ownership of property therein would become more a liability than an asset."

See also *The Air Space as Corporeal Realty*, 29 Harvard L. R. 525 (1916).

11. Baten's Case, 9 Coke's Rpts. 54 (b) (1611); *Fay* v. *Prentice*, 1 C. B. 827 (1845); *Corbett* v. *Hill*, 9 L. R. Eq. Cases 671 (1874); *Ellis* v. *Loftus*, L. R. 10, C. P. 10 (1874). For a detailed history of the maxim see, Bouve, *The Private Ownership of Air Space*, 1 Air Law Review 232 (April 1930).

erality.[12] Further modifications are inevitable. As airplanes increase in speed, size and importance in inter-city transportation, airports have to be enlarged. In addition to the actual airports which they use, modern airplanes require a longer approach to runways, particularly when they approach for instrument landings in bad weather. In the approach area high buildings, smoke stacks, radio towers and similar objects can be the cause of serious accidents which affect the airplane, its passengers and persons living and working in crowded metropolitan areas beneath the traffic pattern. Tragic examples appear in the public press all too often. Legislation concerning the means and extent of Federal control of the use of lands adjoining airports therefore seems certain.[13]

In modern times it has become settled law that the air space, apart from the immediate reaches above the land, is part of the public domain.[14] This modification has not extinguished the right

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12. See Markby, *Airspace Rights and Liabilities as Affected by Aircraft Operation*, 26 Notre Dame Lawyer 629 (1951): "The maxim should not be accepted as law today, even if it were the law at the time of the Accursian gloss, for law must adapt itself to the times, as to matters which are neither contrary to nor demanded by the natural law. As to these indifferent situations, the predominating social interest of the time must be used to provide a living rule which will not be the will of the dead who know not the present times."

In *Pickering* v. *Rudd*, 4 Camp. 219 (1815), Lord Ellenborough anticipated the modern cases. See also Ball, *The Vertical Extent of Ownership in Land*, 76 U. of Pa., L. R. 631 (1928). In *Hinman* v. *Pacific Air Transport*, 84 F. (2d) 755 (1936), the Court said:

"This formula 'from the center of the earth to the sky' was invented at some remote time in the past when the use of space above land actual or conceivable was confined to narrow limits, and simply meant that the owner of the land could use the overlying space to such an extent as he was able, and that no one could ever interfere with that use.

"This formula was never taken literally, but was a figurative phrase to express the full and complete ownership of land and the right to whatever superjacent airspace was necessary or convenient to the enjoyment of the land."

13. In 1952 such a bill was introduced in the United States Senate. (S. 3129, 82d Cong., 2d Sess.). See Federal Control of Land to Protect Airport Approaches, 48 N. W. Un. Law Rev. No. 3, p. 343 (July-Aug. 1953).

14. *United States* v. *Causby, et ux.* (1946), 328 U. S. 256. *The Air Commerce Act of* 1926, 49 U. S. C. A., §§ 171, *et seq.* provides:

§ 176 (a). "The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above all inland waters and the air space above those portions of the adjacent marginal high seas, bays,

of the owner of urban land which is not complicated by the problems of air commerce to exercise a dominant right of occupancy for purposes incident to his use and enjoyment of the surface and that portion of the air space which he may reasonably expect to use and occupy.[15]

Not only may the surface owner build to any height he desires, within physical limitations, but he may sell this air space to others to build on while he retains the ownership and use of the surface. It has long been established that one may own a house, or only one room of a house, in fee without owning the land.[16]

In 1787, an English court pointed out how the metropolis had already adopted the idea of multiple use of the same area, saying:

> "Now, it seems to me, that the construction of all deeds must be made with a reference to their subject-matter. And it may be necessary to put a different construction on leases made in populous cities, from that on those made in the country. We know that in London different persons have several freeholds over the same spot; different parts of the same house are let out to different people. That is the case in the Inns of Court."[17]

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and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. Aircraft a part of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State."

§ 180. "As used in sections 171, 174-177, and 179-184 of this title, the term 'navigable airspace' means airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority, *and such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation* in conformity with the requirements of said section." (Italics added.)

Talcott and Jones, "Airspace Rights of the Subjacent Landowner," 2 Ark. Law Rev. 448 (1948).

15. *Swetland* v. *Curtiss Airports Corp.*, 55 F. (2d) 201, 83 A. L. R. 319, modifying 41 F. (2d) 929 (1932); *United States* v. *Causby*, 328 U. S. 256, 66 S. Ct. 1062 (1946); Eubank, *The Doctrine of the Airspace Zone of Effective Possession*, 12 Boston U. L. R. 414 (1932). For a discussion of airspace ownership in civil law jurisdiction see, Eatman, *Ownership of Airspace in Louisiana*, 8 Louisiana L. R. 118 (1947). See also Elliott, *Law of the Air*, 6 Indiana L. J. 165 (1930); Mace, *Ownership of Airspace*, 17 U. of Cincinnati L. R. 343 (1948).

16. *Loring* v. *Bacon*, 4 Mass. 575 (1808); *Cheeseborough* v. *Green*, 10 Conn. 318 (1834); *Proprietors of the South Congregational Meetinghouse in Lowell* v. *City of Lowell*, 1 Met. 541 (Mass.) (1840); *Rhodes* v. *McCormack*, 4 Iowa 383 (1857); *McConnel* v. *Kibbe*, 33 Ill. 175 (1864) and 43 Ill. 12 (1867); *Ottumwa Lodge, etc.* v. *Lewis*, 34 Iowa 67 (1871); *Badger Lumber Co.* v. *Stepp, et al.*, 157 Mo. 366, 57 S. W. 1059 (1900); *Madison* v. *Madison, et al.*, 206 Ill. 534, 69 N. E. 625 (1904); *Townes, et al.* v. *Cox*, 162 Tenn. 624, 39 S. W. (2d) 749 (1931); Note "Real Property-Air Rights-Condemnation Proceedings," 24 N. Y. U. Law Quar. 443 (1949).

17. *Doe on the Demise of Freeland* v. *Burt*, 1 T. R. 701 (1787).

—Statutory recognition

The recognition of the value of air space on the real estate market has led New Jersey to enact a statute which states in part:

> "Estates, rights and interests in areas above the surface of the ground, whether or not contiguous thereto, may be validly created in persons or corporations other than the owner or owners of the land below such areas, and shall be deemed to be estates, rights and interests in lands."[18]

Illinois also has a statute allowing railroads to sell or lease real estate at, above or below the surface of the ground, providing there is no impairment of the railroad's operations. The Illinois Act is a reflection of the procedures actually used in accomplishing effective use of air rights. In effect it gave legislative approval to what was being done in the area of conveyances of air rights. It did not embody or create startlingly new concepts. It reads:

> "That whenever any railroad, union depot or terminal company is the owner, in fee, of real estate susceptible of other than railroad uses without abandonment of such railroad uses, or different levels or parts of different levels of which real estate may be devoted to such other uses without unreasonable impairment of the use of the remainder for railroad purposes, or the part of said real estate above or under the part thereof needed in such company's railroad operations (with reasonable use of the surface and subsurface of said real estate for foundation and other incidental uses) may be utilized or developed

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18. N. J. S. A. 46: 3-19 *et seq.* [L. 1938, c. 370, p. 940, § 1]. Concerning this New Jersey statute, the Harvard Law Review says: "This apparently unique statute focuses attention on the problems connected with airspace. A few cases at common law seem clearly to recognize a fee in airspace separate from the fee below. * * And in recent years railroads, to realize upon the valuable building space above tracks and yards in downtown districts, have experimented with the conveyance of estates in airspace. * * The present statute dispels lingering doubts as to the full effectiveness of such grants. Thus in New Jersey the railroad's problem is minimized, especially since an accompanying enactment [N. J. S. A. 48: 12-23.1 (L. 1938, c. 369, p. 939, § 1] authorizes railroads to sell or lease estates or interests at, above or below the surface of land which is susceptible of other than railroad uses, provided that there is no abandonment or impairment of railroad uses." *Property—Things Subject to Ownership—Statute Permitting Creation of Estates in Airspace*, 52 Harvard L. R. 335 (1938).

Uniform Aeronautics Act, § 3, 11 U. L. A. states: "The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in Section 4." This act was adopted by several states but was withdrawn from the active list of Uniform Acts recommended for adoption by the states.

for buildings or other structures to be used in other than railroad business, such railroad, union depot or terminal company may improve, utilize and develop the part of such real estate so susceptible of such other use or uses or the parts of which may be so separated for other uses, so as to obtain the benefit thereof and may subdivide the separate level or levels susceptible of such other uses into lots and blocks, construct elevated streets, walks and other appurtenances and facilities proper to such development; and may sell, convey, and transfer to purchasers any separable part or parts (singly or combined) of such real estate, at, above or below the natural surface of the ground, susceptible of such other uses, or may lease to others such part or parts thereof as said company may at any time elect: Provided, that the plan of such development, improvement, utilization or other use (and any subsequent modification thereof), and the conveyance, transfer or lease proposed is in each instance first approved by the Illinois Commerce Commission and said Commission finds that the use of such part of said land or lands so susceptible of or separable for other uses will not unreasonably impair the use of the remainder of said real estate for railroad purposes.''[19]

—Subdividing the air

In the conveyance of air rights it is common practice to subdivide both the land and the air above the land into lots or parcels capable of ascertainment and conveyance. The situation generally requires three types of identifiable lots: one is a cylindrical lot in which a caisson will be sunk; the second is a prism lot sufficient to accommodate a steel pillar running between the caisson and the building proper; and the third is the air lot above some specified level to which the pillars will reach.

The following illustrations indicate how this is done.

19. Ill. Rev. Stat., 1951, Chap. 114, § 174a (1927). In *City of Chicago* v. *Sexton*, 408 Ill. 351, 97 N. E. 2d 287 (1951), the court allowed damages for the value of airspace over railroad property taken by eminent domain. See comment in 30 Chicago-Kent L. R. 76 (1951).

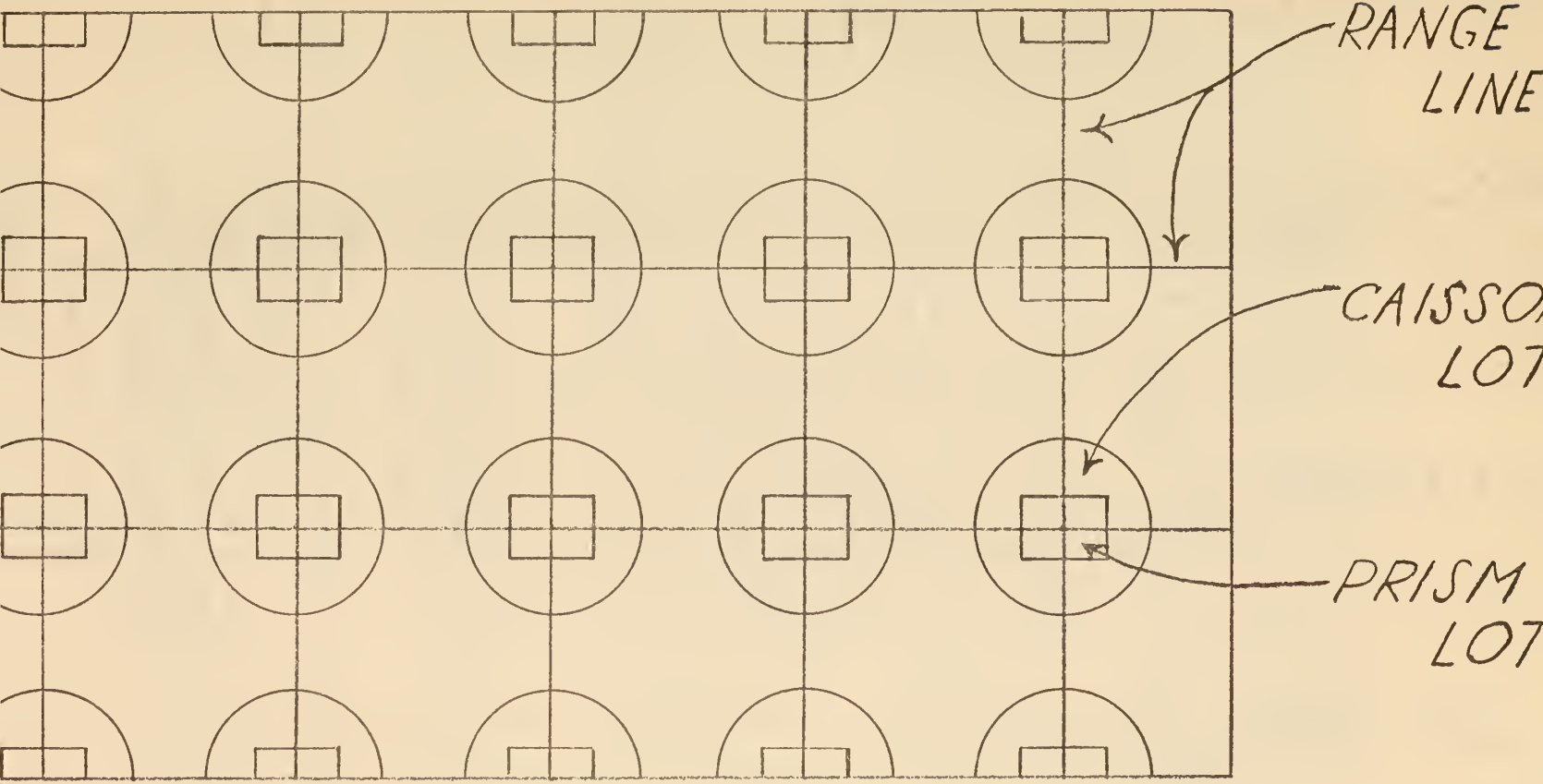
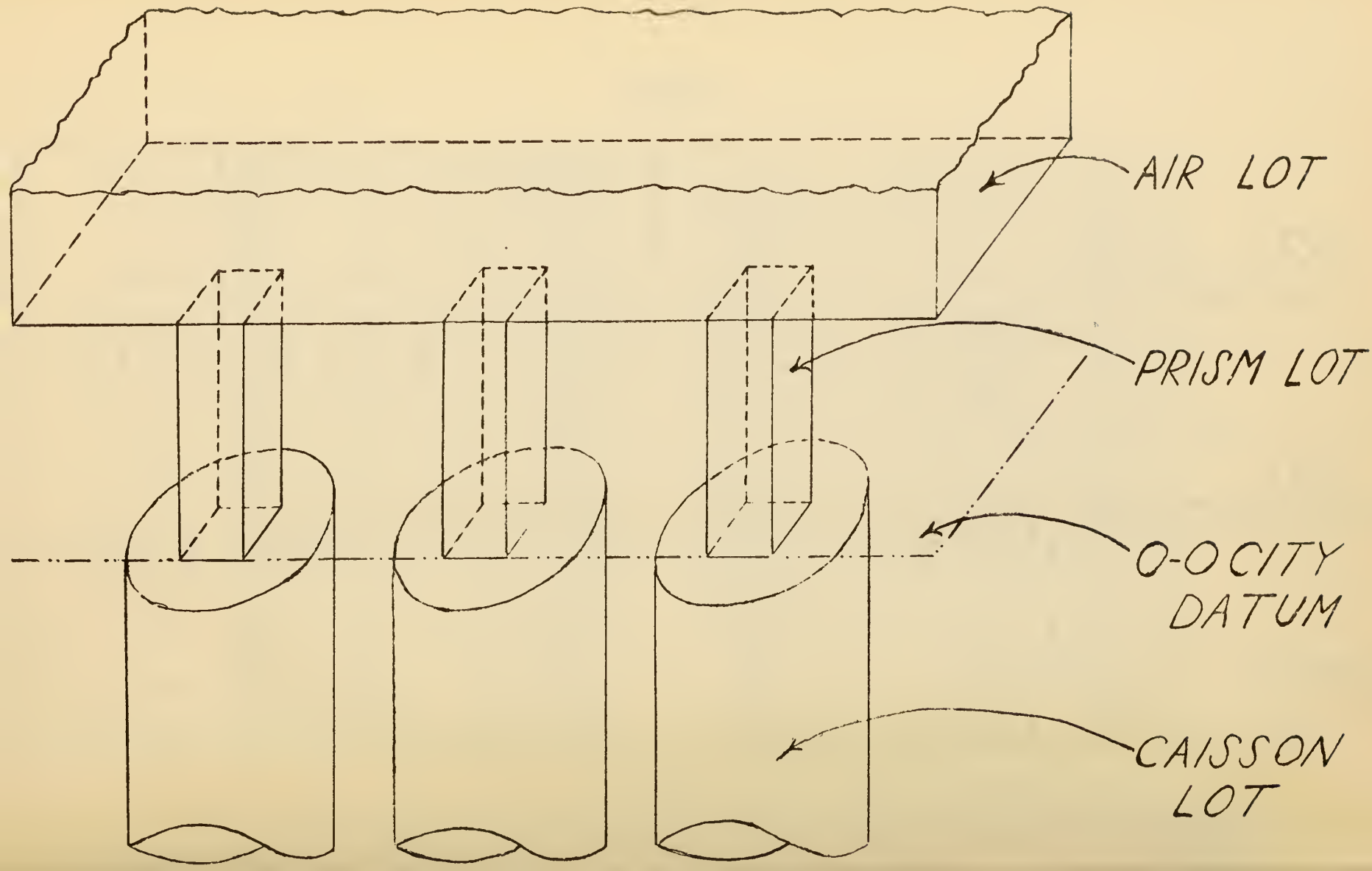


FIGURE 1


AIR LOT
PRISM LOT
O-O CITY DATUM
CAISSON LOT

The land area involved is subdivided into circular, or caisson, lots, as shown in Figure #1. The center of each lot is the intersection of two range lines which are expressly created to locate the caisson lots. The first range line in each direction is fixed with reference to a well known monument. A deed of conveyance can then convey the fee simple title to all property within the caisson lots commencing at a specified city datum and extending downward, as shown in Figure #2. Within these lots is constructed the foundation of the building.

From the specified datum level of the caisson lots, concentric rectangular prism air lots, extend upward to a specified elevation. Frequently this is 23.0 feet. These prism lots also are conveyed in fee by deed. Within them are placed the building's supporting concrete and steel columns, in order to allow the unimpaired passage of trains beneath the structure. Generally if the caisson lots are extended upward to the 23.0 foot level there would be insufficient room among them for such unobstructed passage.

Finally, all the air space over the land area commencing at the 23.0 foot elevation and extending upwards, and within which the building proper is located, is conveyed in fee. Thus the purchaser has the fee title to the caisson, prism and air space lots, while the railroad retains title to the remainder of the property upon which it continues to operate its trains. An express right of access over the railroad property is given to the purchaser for construction and maintenance of the building.

—Other problems

This technique presupposes that the railroad has a fee interest in the property. If the railroad has less than a fee interest the air rights may be leased from it, or a conveyance may be secured from the owner of the reversionary interest.

Another method of accomplishing the same end is to have the entire property conveyed except the space below a designated height, and excepting from the exception the right to place supports and pillars within the excepted space.[20]

Every situation of this general type must of course be looked upon as unique and as involving technical engineering and legal

20. For a discussion of the relative merits of the two methods see Laird Bell, *Air Rights*, 23 Illinois Law Review 250 (1928).

problems of potentially serious character. For instance, when a railroad does own the fee title to the property, the land may be subject to a mortgage either specifically describing it or generally pledging the railroad's assets. Frequently railroad mortgages provide for a release of the mortgage in the event the railroad has sold or contracted to sell its real estate or other property, but not if it merely grants a lease or an easement. Therefore, if the proposed builder does not wish to risk having his building involved in a possible future foreclosure of the railroad's mortgage, it may be necessary to proceed by purchase of the fee title and release of the mortgage and not by merely acquiring a lease which would be subject to the mortgage.

—Application to street widening

Another situation involving air rights may arise when a city exercises its power of eminent domain in the widening of narrow streets to accommodate modern city traffic or has need to extend a street through a large building. Here again a solution sometimes is found through the condemnation of the land and that part of the building which reaches a specified height above the street, or by the condemnation of the land and the portion of the building above it but granting an easement to continue the maintenance of the building above the agreed height. Either course results in the creation of a tunnel beneath the main portion of the building or an arcade notched into the side of the building permitting necessary traffic at the street level and the existence of the building above that level.

Co-operative apartments

Co-operative apartments furnish an illustration of the way in which the needs and desires of city people are met through the adaptation of established principles and procedures to a new situation. They spring from the will of people to combine home ownership and apartment living and to have some of the benefits of each. Many factors contribute to the idea of co-operative ownership of an apartment house, with each participant in the dual role of "tenant" and "owner" of his own portion of a building in which parts are for individual use and parts for common use. High rents which must be paid for purely leased accommodations, inability to find rentable space in a time of shortage, requirements for less capital expenditure in the purchase of an apartment as contrasted with a house, getting more space for the same investment, or a better address, or space in a newer building which can be had only on the basis of furnishing part of the capital, even the social distinction of a substantial tie to socially acceptable neighbors, furnish the impetus for ownership of a co-operative apartment.

Unfortunately, many who become participants, for one or another of these reasons, or because they are influenced by the selling zeal of a promoter of such a project, do not appreciate the implications of the responsibility they assume when they enter the co-operative relationship—the duty of mutual control, the recurrent operating decisions, and the variations in maintenance expense; nor do they realize the problems which may confront them when they seek to sell their interest, inasmuch as the market is more limited and the transfer methods are not as well organized as they are for more conventional properties.

—The background

Co-operative apartments are typically urban but the co-operative apartments idea,[1] which has become identified with the modern

1. D. L. Elliman, "Cooperative Ownership," *2 Annals of Real Estate Practice 3* (1927), p. 3. "As its name implies, cooperative ownership of an apartment building consists in ownership by those who occupy the apartments."

metropolis, can be traced back to ancient times[2] and diverse places.[3] In America it is said to be found in the Indian village before the coming of western civilization.[4]

However, the first co-operative apartment house in the United

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2. A. E. Curtis, "Why Cooperative Apartments Are in Demand," *2 Annals of Real Estate Practice 20* (1927), p. 20: "Back in the days of ancient Greece and Rome, people began to combine their houses to shelter several families under one roof, each family owning its portion of the property and sharing the obligations of 'operation'. This saved land, stone, and plaster, saved labor in building, saved heat for each home—and saved worry about robbers, pirates, and soldiers in those boisterous days of Mars and Bacchus, when every family needed a fort for its own protection."

"As civilization spread and cities grew, it became an economic necessity in each highly populated center to save land; thus it was natural for citizens to combine their homes on one piece of land and join together in owning and operating the property. These were the original cooperative apartments. They were found in practically all the cities of the old countries."

The Co-Owners Construction Corp. (1928), "The Organization and Development of 100 Per Cent Cooperative Buildings,"—"Contrary to popular impression, cooperative apartment houses, cooperative office buildings and garages are not a new real estate development."

3. (From a lecture delivered at Columbia University by Douglas L. Elliman, as reported by the New York Times of April 19, 1925): "The cooperative theory of apartment ownership is by no means a new one. It seems that in some form the earliest natives of the United States had something of this sort in operation. In China and other places in the Far East such community houses existed, but their financial plans have been lost."

The Co-Owners Construction Corp. (1928), "The Organization and development of 100 Per Cent Cooperative Buildings": "Cooperatives were existent in Italy during the 16th century, in Rennes, France in 1792, in England and on the Continent over a hundred years ago. In many instances descendants of the original purchasers still occupy the same apartments."

4. O. H. Castle, "Cooperative Apartments in Southern California," *National Real Estate Journal* (July 26, 1926), p. 39: "A thousand years ago, out in one part of the country, this basic demand did exist and cooperative apartments rose to meet the demand. Moved by the desire for companionship, by religious instincts and by the need for protection, the ancient peoples within the bounds of the present states of Arizona and New Mexico gathered themselves together in community houses which were being governed in an orderly fashion by regularly chosen representatives of the occupants while Columbus was still dreaming on the docks at Genoa."

Chicago Post (July 23, 1924): "A recent expedition has unearthed the remains of Pueblo Bonita, a pre-Columbian cooperative apartment house which sheltered between 1200 and 1500 souls, was governed by regularly chosen representatives of the occupants and was lived in 1000 years ago. Coronado in 1540 saw more than three-score villages within the confines of the present states of Arizona and New Mexico where the Zuni and Hopi tribes lived in such community houses. Similar living accommodations were in use by the Six Nations of Indians of the State of New York, regarded as the highest types of their race."

The Co-Owners Construction Corporation (1928), "The Organization and Development of 100 Per Cent Cooperative Buildings": "The Pueblo Indians occupied a type of cooperative in the sides of the hills in Arizona and New Mexico where a whole tribe lived in adjoining rooms under one roof."

States was created in New York City in 1870,[5] while the first buildings expressly erected for such apartments were in the same city in the early 1880's.[6]

Though begun at this early date, development proceeded spasmodically[7] until the period following World War I, with its scarcity of housing and high rents.[8] An era of both inten-

5. A. E. Curtis, "Why Cooperative Apartments Are In Demand," *2 Annals of Real Estate Practice 20* (1927): "As we have taken over other economic institutions from the parent countries, America was early obliged to adopt the multiple home and in using it more and more as our cities grew. Since 1870 in New York certain families who live in apartments have at the same time owned their apartment homes."

6. The Co-Owners Construction Corporation (1928), "The Organization and Development of 100 Per Cent Cooperative Buildings": In the United States one of the first cooperatives was built in 1882 in New York City, followed by several others erected from time to time up to about 1900.

7. (From a lecture delivered at Columbia University by Douglas L. Elliman, as reported by *The New York Times* of April 19, 1925): "In New York the idea first appeared in the early '80's as so-called French flats in East Eighteenth Street, and soon became quite popular, as is shown by the co-operatives that followed at 80 Madison Avenue, 121 Madison Avenue, the Knickerbocker of 247 Fifth Avenue, the Berkshire of 500 Madison Avenue, the Rembrandt in West Fifty-Seventh Street, and the Hawthorne in West Fifty-Ninth Street.

"The failure of the most ambitious but ill-starred scheme of Jose de Navarro, now known as the Spanish Flats, Fifty-Eighth and Fifty-Ninth Streets at Seventh Avenue, seems to have discouraged further operations of this character for about twenty years. We then find a group of artists successfully reviving the idea in West Sixty-Seventh Street. Then followed a movement chiefly handled by one group which resulted in ten or fifteen buildings being erected, and then the idea lay dormant until the tremendous housing activity, due to the war, bringing high rents and great scarcity, forced the plan to the front."

8. C. S. Taylor, "Cooperative Ownership to Meet the Present Shortage of Buildings," Part II, *33 Architectural Forum 31* (1920), p. 31: "In past years the cooperative apartment house project has been developed for reasons other than those which now promise a rapid growth of interest in this method of bringing about the construction of buildings necessary to meet the housing shortage. The reasons in the years before the war for the development of cooperative ownership were especially ascribed to the rapid increase in land values in sections of the city desirable for downtown residential purposes, and the interest of certain individuals, particularly artists, in developing, on a community basis, buildings containing special features designed to meet their requirements.

"Thus we find that the average cooperative apartment in the early stages of its development in America consisted of a number of units of the studio type, together with service space and community rooms, such as picture galleries, dining rooms, lounging rooms, open to the use of all tenants and their friends.

"Gradually, however, as the servant problem became more troublesome and business buildings began to crowd out the old downtown residential sections, there developed a demand for downtown apartments for the families of business men, and for what might be termed a dilettante class whose interests were chiefly in the artistic and theatrical centers.

"Thus we find a second development of cooperative apartments not especially designed as studios but developed more as comfortable living quar-

sive[9] and extensive[10] creation and development of these apartments then came into being, continuing until the depression

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ters where the maintenance difficulties of the average city dwelling were eliminated, and where better living quarters could be obtained for less money than through ownership of a separate dwelling in the same district.

"Today we have not only these same conditions, all in an aggravated state, but we have also the very practical questions of high building costs, difficulty in obtaining building financing and a gradual withdrawal of speculative and investment interests from the field of new buildings, all coupled with a constantly increasing housing shortage."

E. A. Claar, "Cooperative Home Ownership," *2 Annals of Real Estate Practice 40* (1927), p. 42: "The people of our cities have an inherent desire to own their homes but the stimulus was the advancing rentals due to the war and post-war housing conditions. In many instances, rentals more than doubled, with the result that groups of individuals banded together to buy the homes they were living in—apartment house buildings in which each individual selected an apartment for his home."

See also excerpts from a lecture delivered at Columbia University by Douglas L. Elliman, as reported by *The New York Times* of April 19, 1925.

9. The Co-Owners Construction Corporation (1928), "The Organization and Development of 100 Per Cent Cooperative Building,"—"At the close of the World War considerable impetus was given the movement due to the lack of housing facilities. For this and other reasons during the past ten years over $200,000,000 worth of cooperatives have been erected in New York City alone. It is estimated that over $300,000,000 worth of cooperatives are now in operation in New York City and its suburbs."

C. S. Taylor, "Cooperative Ownership to Meet the Present Shortage of Buildings," *32 Architectural Forum 240* (1920), p. 240: "* * * but it is interesting to note that hundreds of existing buildings have recently been placed on the market for sale under a cooperative plan, whereby a tenant purchases his apartment outright, and the building is operated under the usual cooperative methods as described in later paragraphs."

Chicago Post (February 11, 1925): "A survey of the cooperative apartment development in Chicago by the Chicago Real Estate Board Cooperative Apartments Division shows between $25 and $30 million invested in this type of home ownership."

Interesting Points from Official Investigation of the Cooperative Plan of Apartment Ownership, *33 Architectural Forum 55* (1920).

Taylor, "Applying the Cooperative Method of Financing to Inexpensive Types of Apartment Buildings," *33 Architectural Forum 111* (1920).

Culver, "Successful Cooperative Apartment Buildings," *33 Architectural Forum 187* (1920).

Taylor, "The Cooperative Ownership of Apartment Buildings," *37 Architectural Forum 17* (1922).

Taylor, "Recent Progress in Developing Cooperative Apartment Buildings," *37 Architectural Forum 219* (1922).

Kibbe, "Financing Cooperative Apartments," *53 Architectural Forum 370* (1927).

Litchfield, "Cooperative Apartments," *53 Architectural Forum 313* (1930).

Claar, "Cooperative Apartment Homes as an Investment," Pamphlet published by Northwestern University School of Commerce, Chicago, Illinois (1924).

10. F. P. Stockbridge, "Own Your Own Flat," *8 Annals of Real Estate Practice 7* (1926), p. 8: "In Chicago more than 200 apartment houses are cooperatively owned by their occupants. In St. Paul a million-dollar cooperative house was recently promoted. There are cooperative apartment houses in Detroit and in Flint, Michigan, in Atlanta, Norfolk, Yonkers, and St. Louis. In Long Beach, California, they call them Own-Your-Owns and have built

which brought widespread failures, and ending in a fall from favor.[11]

The idea lay dormant until World War II, which, giving rise to the same problems and conditions as had World War I, provided impetus for a renewed[12] and vigorous activity[13] in this field by a new generation of housing seekers.[14]

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more than twenty of them, three costing more than $1,000,000 each. Atlantic City built one last year. In Washington D. C. there are more than twenty. In Baltimore three experiments have opened the door for further development of the cooperative apartment idea, which is also in its tentative stage in Philadelphia. In San Francisco the cooperative apartment house has become decidedly popular. Broadly, the movement has taken root wherever the supply of desirable home sites is limited."

Atlanta Constitution, November 22, 1925: 'Cooperative apartments, according to Albert W. Swayne, Chairman of the Cooperative Apartment Section of the National Association of Real Estate Boards, are sweeping the entire country, and it is also observed by Mr. Swayne that the movement seems to have had practically a simultaneous beginning in various parts of the United States."

Kansas City Missouri Star, January 23, 1927: "The cooperative apartment, which never has been introduced here in any systematic manner, is to be presented prospective tenant-owners by the C. O. Jones organization."

Birmingham Alabama News, March 4, 1927: "With formal presentation of plans for construction of the first cooperative ownership apartment building in Birmingham, members of the Birmingham Real Estate Board are advised that the same commissions will be given in selling this property as on others."

11. C. C. McCullough, Jr., "Cooperative Apartments in Illinois," 26 Chicago-Kent Law Review 303 (September 1948), p. 305: "The depression years which followed saw a marked curtailment of all building and brought the expansion of the cooperative apartment building movement almost to a standstill. Many existing buildings were sold under foreclosure, and many disadvantages not theretofore considered were revealed."

"Cooperative Apartment Housing," Note 61, *Harvard Law Review 1407* (September 1948), p. 1407: "The cautious, however, have recalled that widespread failure among cooperative apartment houses promoted during the 1920's revealed defects in the cooperative plan. The projects were generally promoted by real estate operators only when necessary to counteract the slump caused by the inability of commercial apartment buildings to attract capital. In many instances promoters' profits were exorbitant, sometimes reaching 100 per cent. Frequently, excessive mortgaging resulted in high amortization charges, and these made the cost of living in most cooperatives during the depression higher than the cost of renting comparable apartments. Unable to escape financial dependence upon their insolvent neighbors, many solvent tenants lost their investments."

Colean, "American Housing," *The Twentieth Century Fund* (1944), p. 234.

"Postwar Co-ops," *88 Architectural Forum 93* (1948).

12. "Cooperative Apartment Housing," Note 61, *Harvard Law Review 1407* (September 1948), p. 1407: "The revival of interest, reminiscent of a similar development after the last war, is again largely attributable to inflated construction costs and to legislative rent ceilings, which have made commercial apartment buildings a poor risk for professional investors. Veterans' organizations, labor unions, and real estate promoters have turned to prospective occupants of the new buildings as the logical source of the necessary capital."

89 Architectural Forum 14 (August 1948): "As a cooperative apartment hotel, Hampshire House will have only one predecessor, 825 Fifth Avenue, one of the few cooperative ventures to weather the depression."

—Legal structure

The legal means of organizing a co-operative apartment project are not fixed or inflexible or necessarily prescribed in detail in the statute books. And the legal results of the things which are done in such attempts do not always fit accurately into established segments of the law. Whether as a matter of pure theory a participant "owns" his apartment or is a tenant, how he is affected by rent control and similar legislation, the kinds of legal relationships which different methods of organization produce, and the practical problems of controlling acceptability of participants while providing reasonable flexibility of action, and insuring adequacy of management and financial success of a project frequently require the use of concepts not precisely adapted to the ways in which they are used. But the end is accomplished even though courts and scholars are left debating the exact nature of the rights which have been created or the responsibilities which attach to particular relationships which result.

A co-operative apartment project, which attempts to combine ownership by many individuals with its consequent individual liability for upkeep and maintenance, and group management and

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13. *89 Architectural Forum 16* (November 1948): "In Chicago, commercial firms were already snapping up space in what will probably be the first tenant-owned office building in the U. S." [Rush-Huron Building.]

R. Marks and K. J. Marks, "Coercive Aspects of Housing Cooperatives," *62 Illinois Law Review 728* (Jan.-Feb. 1948), p. 728: "In June 1947, however, Congress enacted the Housing and Rent Act of 1947, effective July 1, 1947, which removed from the Office of Rent Control any jurisdiction whatsoever over evictions. As a consequence, the cooperative movement iu existing buildings in the Chicago area spread as quickly as fire in a dry forest, moving from the luxury apartments into the 'white collar' areas and then sweeping into the low rent or 'slum' areas, all at exorbitant prices."

14. Flamm, "Housing Cooperatives," *Lawyers Guild Review*, Vol. 6, No. 5 (1946): "Just as the farmer would gain by retaining the crops needed for his own use, so the apartment tenant gains by buying and managing the apartment which he must coustantly use, and which he, himself, can most economically manage; for when he invests in his apartment, he invests in a business that is fully under his own control. He is not dependent upon wise or honest management by others, nor upon business conditions. He is himself not only the 'manager' of the enterprise, but also the sole 'customer' who provides the profits needed to assure the success of his investment. His apartment is in a real sense, a completely rounded out business enterprise which is owned and operated by himself, freed from all the risks attending the usual commercial enterprise."

Ross, "Planning and Projecting a Cooperative Apartment Plan of Ownership," Pamphlet published by the National Association of Real Estate Boards (1949).

operation,[15] ordinarily is accomplished by one of three legal structures: either (1) some form of fee simple ownership, or (2) the creation and operation of a trust, or (3) some form of corporate entity and operation.

In the first type of legal structure ordinarily each "tenant-owner" has the title of his apartment conveyed to him in fee,[16] with entrances, stairways, halls, and public rooms along with rights of support, being controlled by cross-easements. Where this technique is employed the methods of managment and apportionment of maintenance and operating expenses usually are determined by contractual agreements.[17] The several resulting rights of property cannot be technically defined and charted with any degree of certainty.

This form, however, provides the least flexibility in management and operation and is said to be used less frequently than are the other two.[18]

Under the second method the legal title to the realty is placed in a trustee, usually a corporate one,[19] and the purposes and provisions

15. *Cooperative Apartment Housing* Note 61 Harvard Law Review 1407 (September 1948) p. 1408: "A cooperative apartment house requires legal machinery which will give the individual tenant-owner something closely approximating 'title to a slice of air', while reserving to a collective entity the function of management and the power to assure proportional sharing of common expenses."

16. Yourman, *Some Legal Aspects of Cooperative Housing*, 12 Law and Contemporary Problems 126 (1947), p. 127; Castle, *Legal Phases of Cooperative Buildings*, 2 Southern California Law Review 1, (October, 1928) p. 3.

17. 1 American Law of Property 198, Little, Brown & Co. (1952).

18. *Cooperative Apartment Housing* Note 61 Harvard Law Review 1407, (September 1948) p. 1410: "This plan is at best cumbersome and may sacrifice unified control of the building. Sale of an apartment leaves other owners unprotected against tenants who are undesirable, either because they interfere with harmonious relations or because they are unable to bear their share of the operating expenses. Subleasing is difficult to control, and evaluation for tax assessments and insurance is more complex than when computed for the entire building. The individual's risk of tort liability is increased. Because of these drawbacks, the 'horizontal fee' has been used infrequently and never in the larger projects. Since, however, its use is a practical method of eliminating the tenants' financial interdependence; its popularity is increasing."
Castle, *Legal Phases of Cooperative Building* 62 Southern California Law Review 1 (October 1928), p. 3.

19. MacChesney *The Principles of Real Estate Law* (1928) The Macmillan Company Ch. 8, p. 370.
Castle, *Legal Phases of Cooperative Buildings* 2 Southern California Law Review 1 (October 1928).
McCullough *Cooperative Apartments in Illinois* 26 Chicago-Kent Law Review 303 (September 1948).

of the project are set out in a declaration of trust.[20] Certificates of beneficial interest, entitling the holder to an apartment, and to the use of facilities common to the building, are issued by the trustee to the "tenant-owners,"[21] accompanied in some instances by leases.[22]

A Board of Governors or Executive Committee is selected by and from among the "tenant-owners" to advise the trustee in its management of the project.[23] Usually such a trust arrangement pro-

20. Castle, *Legal Phases of Cooperative Buildings* 2 Southern California Law Review 1 (October 1928) p. 10: "After a suitable preamble, the declaration of trust sets out that a primary purpose of the trust is to allot to the beneficiaries thereunder the exclusive and permanent right of occupancy of the apartments in the building during the life of and subject to all the provisions of the trust, together with rights in common to the use of the public rooms and facilities. Then follows the form of certificate of beneficial interest or assignment of beneficial interest. * * The declaration provides that any beneficial interest may be pledged, mortgaged or otherwise hypothecated by a written instrument in form prescribed, an executed duplicate original of which is filed with the trustee.

"The declaration prescribes the obligations assumed by the beneficiary, which are summarized in the certificate or assignment of beneficial interest. It is provided that in the event of any default in the performance of such obligations (including the obligation to pay a proper proportion of the expense), which default shall endure for a stipulated period, the board of governors may declare such beneficiary to be in default, and the trustee may proceed to sell his beneficial interest at public auction sale. The procedure and notice prescribed for the sale are similar to those for sales of real property upon execution. The proceeds of sale are applied to the satisfaction of the obligation of the defaulting beneficiary, including costs of sale, with the balance paid to the person entitled. The trustee's deed upon sale is made conclusive. Such clauses are common in express trusts and there is little doubt as to their validity and efficacy."

McCullough *Cooperative Apartments in Illinois* 26 Chicago-Kent Law Review 303 (September 1948) p. 307.

21. Castle *Legal Phases of Cooperative Buildings* 2 Southern California Law Review 1 (October 1928) p. 10: "The trustee may either issue certificates of beneficial interest to the various apartment owners, or it may issue the entire beneficial interest to the original promoter of the project, who may assign to the purchasers their respective shares thereof."

22. MacChesney *The Principles of Real Estate Law* (1928) Ch. 8, p. 370 The Macmillan Company.

McCullough *Cooperative Apartments in Illinois* 26 Chicago-Kent Law Review (September 1948) p. 303.

23. Castle *Legal Phases of Cooperative Buildings* 2 Southern California Law Review 1 (October 1928) p. 11: "Provision is made [in the declaration of trust] for a 'Board of Governors' elected from the apartment owners and by them, each owner ordinarily casting votes proportionate to his beneficial interest. This board acts in a capacity advisory to the trustee in supervising the operation of the building and in fixing the annual budget or assessment for expenses, but the ultimate power and authority to control and manage the trust estate are retained by the trustee. This retention of power is thought to be sufficient to save the trust from the danger of being held a partnership. The test in this regard is, first, the intention of the parties, and second and more important, the degree of control exercised by the beneficiaries."

MacChesney, *The Principles of Real Estate Law* The Macmillan Company (1928) Ch. 8, p. 370. General MacChesney refers to it as an "Executive Committee" of the apartment owners.

vides adequate powers so that the trustee may mortgage the trust property, or even terminate the trust and sell the realty, upon the request of a given proportion of the owners of beneficial interest.[24]

The trust form, while more flexible than the fee form, and used more than the fee form, is not as common as the corporate form.[25]

When using a corporate form of legal structure for a co-operative apartment project, incorporation ordinarily may be effected under a number of different statutes:[26] a general incorporation act,[27] a nonprofit corporation statute,[28] a special co-operative statute,[29] an

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24. Castle *Legal Phases of Cooperative Buildings* 2 Southern California Law Review 1 (October 1928) p. 12.
McCullough *Cooperative Apartments in Illinois* 26 Chicago-Kent Law Review 303 (September 1948) p. 308.

25. Yourman *Some Legal Aspects of Cooperative Housing* 12 Law and Contemporary Problems 126 (1947) p. 128: "When it is considered that the law relating to trusts is neither as definite nor as well understood by lawyers as corporation law, it is seen that the task of safeguarding against legal pitfalls is rendered extremely difficult.
"Moreover, the use of the trust form for a cooperative housing organization results in either the abandonment of democratic control by the members or a risk of personal liability on their part. This undesirable choice stems from the fact that even in states which recognize Massachusetts trusts, the right of members to manage the affairs results in their being held personally liable as partners upon the obligations of the enterprise.
"While the risk of personal liability is undesirable, the alternative to it under the trust form, the relinquishment of democratic control, is equally unsatisfactory. It would remove mutuality of responsibility in the management of the project and almost certainly invite an apathy which would be destructive of community spirit and morale."

26. McCullough *Cooperative Apartments in Illinois* 26 Chicago-Kent Law Review 303 (September 1948) p. 309.
MacChesney *The Prineiples of Real Estate Law* Ch. 8, p. 372, The Macmillan Company (1928).

27. Yourman *Some Legal Aspects of Cooperative Housing* 12 Law and Contemporary Problems 126 (1947) p. 132: "* * * but difficulty may be encountered when an attempt is made to provide for the policy to be followed in proxy voting, expelling undesirable members, restricting the transfer of stock, etc. While the corporation can often be given the power by the articles or by-laws to carry out the desired policy of these matters, limits may be prescribed by the statute of incorporation."

28. McCullough *Cooperative Apartments in Illinois* 26 Chicago-Kent Law Review 303 (September 1948) p. 311: "* * * but it must be remembered that a corporation organized under the latter statute [non-profit] may not issue shares of stock nor distribute income in the form of dividends."

29. Yourman *Some Legal Aspects of Cooperative Housing* 12 Law and Contemporary Problems 126 (1947) p. 131: "In many states the cooperative association laws are designed only for agricultural marketing or other specific cooperatives and will not permit the incorporation of a cooperative designed to furnish housing to its members. Where, however, those laws are broader, they ordinarily provide the best basis of organization for a cooperative housing association."

urban redevelopment law,[30] or a limited dividend housing act.[31] Provisions unique to such a project are placed in the by-laws.[32]

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30. *Nonprofit Housing Projects in the United States*, U. S. Department of Labor, Bulletin No. 896 (1947) p. 19: "Some 20 states have passed urban redevelopment laws, the purpose of which is to facilitate slum clearance and the reclaiming of blighted areas. Such processes, of course, imply large-scale operation and great amounts of money. Probably very few cooperative groups, by themselves, would be financially or technically qualified to provide housing under the redevelopment plan. If, however, they could enlist the interest of existing cooperatives, and of one or more limited-dividend, philanthropic public, or mutual housing enterprises, such a project might be feasible."

31. Yourman *Some Legal Aspects of Cooperative Housing* 12 Law and Contemporary Problems 126 (1947) p. 129: "As the name indicates, these statutes place limitations upon profits and usually the states exercise regulatory functions through housing boards with respect to the operations of the corporations."

32. Castle *Legal Phases of Cooperative Buildings* 2 Southern California Law Review 1 (October 1928) p. 4: "The by-laws of cooperative apartment corporations contain, in addition to various customary clauses, certain provisions peculiar to this type of project. It is provided that the corporation shall have upon all the shares registered in the name of any stockholder a prior lien for debts due the corporation by such stockholder, and may enforce such lien by selling the shares as pledged property upon notice at either public or private sale. It is stipulated that the shares issued to any purchaser or holder, and the certificates representing the same, shall be transferable only as an entirety, except when consent to the contrary be given by the directors or stockholders. This is part and parcel of the effort to tie the stock and lease together and to maintain the ownership of the apartments in the hands of their occupants. It is sometimes provided also that no transfer of shares may be made without securing the consent of the board of directors or a given proportion of the remaining stockholders. Sometimes, instead of a prohibition of transfer without consent, an option is given to the corporation to purchase the stock upon terms identical with those upon which it is offered to any other purchaser. The by-laws further recite that it is the purpose of the corporation to operate its property on a mutual or cooperative basis for the sole use of its stockholders, without profit to the corporation, it being understood that all expenses for taxes, mortgage indebtedness, maintenance and operation of the building shall be met by assessments against the stockholders in proportion to their holdings; that the entire building shall be leased to stockholders under the form of lease approved by the directors; and that a stockholder holding the required number of shares, as shown by a schedule set out in the by-laws, shall be entitled to a lease of any given unleased apartment. Subleases without the consent of the directors are prohibited, and regulations for the maintenance and use of the property by individual stockholders are prescribed. It is made the duty of the directors, at their first meeting of each year, to prepare a budget covering the estimated cost of operating the property during the ensuing year, including payments to be made on account of indebtedness, taxes, and the like, and to levy an 'assessment' sufficient to raise this sum, each stockholder to pay in monthly installments a share thereof proportionate to his stock holdings. Upon default in payment of the 'assessment', sale of the pledged stock may be had or proceedings in unlawful detainer may be brought. The by-laws also set out that upon transfer of a stockholder's unit of stock, or any part thereof, his rights as lessee under his proprietary lease shall terminate and shall pass to the transferee, but such transferee shall have no right to occupy the demised premises unless and until the consent of the directors or a specified

Ordinarily the stock certificates contain provisions restricting subleasing and the transferability of the stock, providing for the assessment of costs, and giving the corporation a prior lien on the stock, in addition to the standard provisions found in such instruments.[33] A holder of the requisite amount of stock, as set out in the by-laws, generally receives a "proprietary lease,"[34] which in turn entitles him to an apartment.[35] Here again, provisions peculiar to this

proportion of the stockholders shall be obtained. It is further provided that leases to stockholders may be assigned only to an assignee who shall simultaneously acquire the assignor's shares of stock and in writing assume the obligations of the assignor under the lease, and then only with the consent of the directors."

MacChesney *The Principles of Real Estate Law* Ch. 8, p. 376, The Macmillan Company (1928): "The by-laws of a corporation which are to be used in a cooperative project are no different from the by-laws of an ordinary business corporation. In fact here is a matter where there might seem to be some danger. The rights of an individual in a cooperative project should be definitely established. These rights should be set out in the Proprietary Lease where they cannot be changed except by a substantial group of the tenant-owners. If they are placed in the by-laws of the corporation, and not in the lease, one cannot be sure that they will not be changed by the board of directors which is made up of only a small number of the tenant-owners. In many states, for example in the State of Illinois, the by-laws of a corporation can be changed or amended at any time by a majority of the board of directors. As a result, some of the by-laws of cooperative apartment projects contain nothing peculiar to this type of enterprise. The by-laws are, however, a convenient place to record the provisions which are unusual in the project so that some of the organizers have incorporated in the by-laws the provisions which are peculiar to the cooperative project and which are also found in the proprietary lease and stock certificates."

33. MacChesney *The Principles of Real Estate Law* Ch. 8, p. 377, The Macmillan Company (1928): "Among the provisions which are found in the stock certificate of the cooperative apartment projects are the following: (a) A provision to the effect that the shares represented by each certificate are transferable only as an entirety except where the consent of the board of directors is secured. (b) A provision prohibiting the transfer of the shares of stock of the corporation without securing the consent of the corporation expressed by a majority of the board of directors or two-thirds of the number of the remaining stockholders. (c) Some of the stock certificates contain option of purchase instead of prohibition of sale. * * (d) Lien for debts due."

34. Castle *Legal Phases of Cooperative Buildings* 2 Southern California Law Review 1 (October 1928) p. 6: "The most important instrument in such a corporation is the so-called proprietary lease. The ownership of stock is important chiefly because it qualifies the stockholder to obtain such lease and to vote for members of the board of directors who supervise the operation of the building. The other attributes of stock ownership, namely, the right to participate in dividends and in assets upon dissolution, are of doubtful worth in this type of corporation. There are, in the very nature of things, no dividends, and the reversionary interest in a building entirely subject to long term leases may be of little or no intrinsic value."

35. McCullough *Cooperative Apartments in Illinois*, 26 Chicago-Kent Law Review 303 (September 1948) p. 315: "A stockholder is not the owner of the corporate property, even if he owns all of the stock, hence he would not be entitled to use and occupy the premises merely by reason of his

project, governing rights under the lease in the advent of the lessee's death, or diminution in his shares of stock, the assigning of the lease or subletting, and providing for an annual assessment and house rules, are joined in the proprietary lease with those provisions common to the customary long-term lease.[36]

The trust form or the corporate form of project may operate under the "100 per cent plan" or the "semi-cooperative plan." In the 100 per cent plan, every apartment is occupied by a "tenant-owner," while in the semi-cooperative plan some of the apartments are rented out to third parties and the proceeds applied to the project expenses.[37]

—Legal concepts involved

The majority of the cases involving co-operative apartment projects which are found in the reports of decisions of courts of last resort deal with problems which exist where the corporate type of operation has been engaged in. In some of these cases the question has arisen as to the extent and quality and legal character of the interest which is possessed by a purchaser of a co-operative apartment who is commonly called a "tenant-owner." The question remains largely unanswered. Some of the courts in discussing the question have expressly refused to give the interest a name, while others have used designations ranging from "tenancy" through "equitable title." Apparently there has arisen in the field of real property a type of interest, peculiar to the co-operative apartment concept, which does not fit precisely in any of the ancient legal pigeonholes and which is not fully or accurately defined by existing legal terminology.

The legal writers in this field also are unable to agree on the legal niceties of this phase of the subject. Some contend that the

ownership of the shares. The beneficiary's right to possession of any specific portion of the trust property is likewise based on his contract. Thus the proprietary lease is the very foundation of the cooperative arrangement; the ownership of shares of stock in the corporation, or the holding of beneficial certificate under the trust, being important chiefly because they enable one to obtain a proprietary lease entitling the lessee to occupy a given amount of living space or a specific apartment."

36. Castle *Legal Phases of Cooperative Buildings* 2 Southern California Law Review 1 (October 1928) p. 6.

37. MacChesney *The Principles of Real Estate Law* Ch. 8, p. 366, The Macmillan Company (1928); *Standard Forms and Methods of Operation for 100 Per Cent Cooperative Apartment Projects*, Chicago Real Estate Board (1928).

purchaser becomes merely a "tenant" of no greater status than one in the common leasehold arrangement, and others conclude he becomes an "owner." Apparently those who favor the "owner" idea base their view upon the premise that while the purchaser does not obtain the legal title he does receive an interest greater than that of a mere tenant. On one point there seems to be general agreement: the purchaser of a co-operative apartment does not receive a fee interest in real property.[38]

The courts likewise have failed so far to agree upon the technical legal relationships which are involved, although they seem to have had no difficulty in deciding the cases before them. Depending upon the kind of case before them and the decision they thought proper to be rendered, they have supported their opinions by different processes of reasoning. New York courts have stated that:

> "the stockholders are in effect regarded as the owners of the rooms occupied or to be occupied by them: * * *"[39]

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38. Castle, *Legal Phases of Cooperative Buildings*, 2 So. Cal. L. R. 1, 17 (October 1928), prefers the concept of a person "owning" an apartment in a cooperative apartment project and supports his position by a California statute which defines ownership as the right of one or more persons to possess and use a thing to the exclusion of others.

Other commentators have taken issue with some of his views. The author of a Note in the Harvard Law Review declares that, "It seems unlikely that a court would conclude that cooperative securities are merely evidence of title to real estate and therefore not covered by the federal or state statutes." *Co-operative Apartment Housing*, NOTE 61 Harvard Law Review 1407, 1408, 1425 (September 1948). An article in Illinois Law Review in discussing whether or not a co-operative apartment owner came within the term "landlord" in the Federal Housing and Rent Act of 1947 so as to be able to evict a tenant, concluded that a shareholder in a cooperative corporation can in no sense be considered a landlord under the Federal Housing and Rent Act of 1947, upon the theory that "It is well settled that a corporation shareholder is in no legal sense an owner of corporate property but is merely a shareholder in the corporation entitled to his distributive shares of corporate assets upon dissolution." Robert Marks and Kenneth J. Marks, *Coercive Aspects of Housing Cooperatives*, 42 Ill. L. R. 728, 746 (January-February 1948). McCullough, *Cooperative Apartments in Illinois*, 26 Chicago-Kent L. R. 303, 321 (Sept. 1948) says: "The advertisements confronting a prospective member of a co-operative apartment project offer to 'sell' him an apartment. He is told he may 'buy' one for a stated price and become the 'owner' thereof. This concept of ownership would give the individual an initial impression that he will own his apartment as he would a house and lot. The forms of co-operative organization that exist today, however, especially in the apartment field, do not give a fee title to the buyer, and probably will not until the practice of subdividing the air becomes more widespread than it is today."

39. *542 Morris Park Ave. Corporation* v. *Wilkins et al.*, 197 N. Y. S. 625, 627 (1922). Subdivision 1-a of section 1410 of the Civil Practice Act of New York provides that summary proceedings of the character involved in this case may be maintained—"to recover premises constituted a part of a building and land which has been in good faith sold to a corporation formed

and

> "the relationship between the tenant-owners in the present case is in effect a partnership for the mutual benefit of the co-operative owners expressed in corporate terms."[40]

In another case the court coined the phrases "owner-lessee" and "landlord-lessor."[41] In a case brought under the Emergency Hous-

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under a co-operative ownership plan, whereof the entire ownership shall be held by the stockholders in proportion to the number of rooms occupied or to be occupied by them in such building and all apartments or flats therein have been leased to stockholders of such corporation for their own personal, exclusive and permanent occupancy to begin immediately upon the termination of any tenancy of the apartments or flats leased by them existing on the date when this subdivision takes effect."

40. *Tompkins* v. *Hale*, 15 N. Y. S. 2d 854, 857 (1939). But see *Application of Miller*, 18 N. Y. S. 2d 59, 62 (1940), wherein the court says: "The corporate owner here was organized as a vehicle for the establishment of a community of homes rather than for the purpose of pecuniary profit to the stockholders. The primary interest of every stockholder was in the long-term proprietary lease. The stock was incidental to that purpose and afforded the practical means of combining an ownership interest with a method for sharing assessments for operation and maintenance proportionately. * * The certificate of incorporation of the respondent, the prospectus under which the stock was offered, the stock subscription agreement, the payments made thereunder and the proprietary lease itself, must all be read together to determine the relationship between the corporate owner and the proprietary lessee. * * These establish the proprietary lessee not as an owner but as a third party having distinct rights against and distinct obligations toward the owner."

41. In *Curtis* v. *LeMay*, 60 N. Y. S. 2d 768, 770 (1945) after citing with approval *542 Morris Park Ave. Corporation* v. *Wilkins, et al.*, the court said: "It seems clear therefore that a person standing in the position of Curtis in this action is more of an owner-lessee than the mere lessee in a succeeding lease. By the assignment of all rights of the 432 Corporation to him, including LeMay's lease, he stands in the position of the landlord-lessor and acquires all of that entity's rights."

In *Smith* v. *Feigin*, 75 N. Y. S. 2d 204, 207 (1947), wherein the owner of a long term lease of space in an *office* building operated under the cooperative plan, organized under the Stock Corporation Law and not under the Co-Operative Corporations Law, sought to recover such space from a subtenant of his assignor, under the New York Rent Act, on the ground that he required such space for his own immediate and personal use. The court expressly rejected the opinion in *542 Morris Park Ave. Corporation* v. *Wilkins, et al.* The court said "The petitioner, though styled a "proprietary lessee, is still a lessee; he is but a stockholder of the corporate owner, who, by reason thereof, has obtained the right to lease certain space,—'rental area' in a building owned by the corporation; he acquired no ownership or title to the area, but, as the lease itself provides, acquired merely the right to possession and peaceable enjoyment of the rented space, subject to having his lease terminated, and being ousted from such possession if he fails to perform the covenants and conditions on his part to be performed." However, on appeal (77 N. Y. S. 2d 229, 232, 298 N. Y. 534 (1948)), the court declared: "The meaning of the word 'title' as used in this statute is to be gathered from the context, from the subject matter to which it is applied. The emergency rent laws are sufficiently elastic to designate a person in the

ing Rent Control Law to recover possession of an apartment, the court said:

> "It is true that the object of cooperatives 'so far as practical, is to constitute the persons to whom space in the building [is] assigned as the owners of such space', * * * and that the stockholders in a cooperative, in effect have title to each respective apartment. It is not true, however, that the space or apartment to which title is held by a cooperative shareholder becomes a house rather than an apartment because of the peculiar nature of this type of ownership. There are many similarities between the ownership of a house and that of stock in a cooperative apartment, but the differences between the two types of housing accommodations are essential and obvious."[42]

A California court took refuge in broad language. It said:

> "It follows, therefore, both from the expressions of the lease as well as from the general situation, that the right to a proportional part of the sales price attached to the ownership of the interest created by the written instrument, and not to a membership in the corporation. Therefore the lessee not only had a leasehold interest, conditioned upon his payment of his proportion of the expenses of maintenance, but he had a right to have distributed to him upon the sale of the property his proper share of the sales price in such an event, and if a member as well as an owner, to a voice in the general management of the property. We are not concerned with the designation given to the instrument by which his rights were defined, but must look to the substance thereof. * * When we do it is quite apparent that the respondent was vested with a valuable interest in real property. While the corporation held the legal title, yet, to all intents and purposes, the entire equitable

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position of the appellant, as having title to this rental area. The purpose of the acts would be frustrated by any other interpretation. Where the circumstances are such as to warrant doing so, the courts, for certain purposes, will pierce the corporate veil, looking behind the corporate fiction. * * In this instance, and for this limited purpose, the intention of the legislature is more adequately accomplished by disregarding the entity of Doctor Owning Corporation and treating the tenants as the titleholders of their respective spaces."

42. *Danforth* v. *McGoldrick*, 109 N. Y. S. 2d 387, 389 (1951). In *Flamman* v. *McGoldrick*, 110 N. Y. S. 2d 477 (1952) the court said: "Subdivision 2 of section 5 of the Emergency Housing Rent Control Law, McK. Unconsol. Laws § 8585, subdivision 2, referring to one and two family houses is broad enough to include an owner of a cooperative apartment," and this decision was followed in *Application of Massey*, 112 N. Y. S. 2d 677 (1952).

estate was distributed proportionately among the owners of the apartments. It is unnecessary to assign a name to the interest thus created. It is sufficient for the purposes of this case to conclude that the ownership of the apartment constituted an interest in real property.''[43]

In another case a California court refers to co-operative apartments as ''an interest in real property'' and ''real estate.''[44]

Other courts have had the same difficulty.[45]

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43. In re *Pitts Estate*, 218 Cal. 184, 22 P. 2d 694, 697 (1933).

44. *Ten Winkel* v. *Anglo Cal. Sec. Co.*, 74 P. 2d 317, 320 (1937).

45. A Pennsylvania court referred to the corporation and the apartment purchaser as landlord and tenant in *Chelten Ave. Bldg. Corporation* v. *Mayer*, 172 A. 675 (1934). The court, however, modified this in *Mayer* v. *Chelten Ave. Bldg. Corporation* 183 A. 773, 774 (1936) by saying: "This right to take possession existed in the owner (corporation) notwithstanding the tenant owned stock in the apartment building and may have been to that extent a part owner. Such ownership was subject to the terms of the lease." In *Tudor Arms Apartments, et al.* v. *Shaffer, et al.*, 191 Md. 342, 62 A. 2d 346, 349 (1948), a Maryland court said: "It has been recognized, under Acts modeled upon the Federal pattern (Rent Control law), that purchasers of apartments under the cooperative plan are to be treated as landlords or owners." This opinion is cited in detail by the Illinois Appellate Court in *Kenny* v. *Thompson*, 338 Ill. App. 248, 87 N. E. 2d 229 (1949). In *Hicks* v. *Bigelow*, 55 A. 2d 924, 926 (1947), the question was whether under the District of Columbia Emergency Rent Act [Code 1940, Supp. V. 45-1601 *et seq.*] the purchaser of a cooperative apartment, desiring it for her personal occupancy, was entitled to evict a tenant in possession. Section 1611(g) of the Act defines a landlord as including "an owner, lessor, sublessor, or other person entitled to receive rent for the use or occupancy of any housing accommodations." The court concluded that: Looking at all these circumstances [sale agreement, transferable stock, proprietary lease, etc.] we think this plaintiff was entitled to maintain her suit for possession. True, she did not own a fee simple title; but that is not made a condition precedent by the Rent Act. Under the Act, as we have said, she is a landlord under the classification which includes 'lessor, sublessor, or other person entitled to receive rent.' As between plaintiff and the cooperative corporation in form there is a landlord-tenant relationship, but in substance the apartments are owner occupied. The amounts paid by the stockholders as 'rent' really represent the cost of operation, maintenance, etc. of their own property." * * * "Such purchaser is more than a mere tenant or lessee. She has certain proprietary rights which a mere tenant does not have. She has most of the attributes of an owner." The same court, in *Glennon* v. *Butler*, 66 A. 2d 519, 522 (1949) referring to the Hicks case, said: "Here, as in that case, it is clear that the indicia of ownership are in the purchaser even though the legal title is in the association. * * * "The purchaser thus coming within the provisions of the Rent Act as a landlord, it is not necessary to define the precise nature of his estate in the property, whether legal or equitable, a chattel real or a chattel interest, a joint tenancy or trust ownership. It is clear that he has acquired rights which he may enforce as the equitable and beneficial owner of the apartment and as a member of the association owning the project, irrespective of his not having title to the fee in himself." See also *1915 16th St. Co-op. Ass'n.* v. *Pinkett*, 85 A. 2d 58, 59, 61 (1915); *Valois, Inc.* v. *Thorne*, 86 A. 2d 530, 532 (1952); *Stafford Owners, Inc.* v. *United States*, 39 F. (2d) 743, 746 (1930); *Moses, et al.* v. *Boss, et al.*, 72 F. (2d) 1005, 1007 (1934); *Abbot, et al.* v. *Bralove, et al.*, 81 F. Sup. 532, 539 (1948).

While the courts lack agreement as to the interest acquired by a purchaser of a co-operative apartment, the significant fact remains that despite their differences the courts have continued the process of adapting the law to the actions of those who buy and sell and utilize rights of property of this nature without recourse to technical objections aimed at defeating the obvious intention of the co-operative apartment "owner".

CHAPTER TEN

THE CONCLUSIONS REACHED

From the foregoing study the following very general conclusions have been reached:

1. The influence of the metropolis upon the concepts, rules and institutions relating to property is not unique. It follows the historical pattern of evolutionary adaptation of the law to the interests of the group to which it is applicable.

2. That influence results largely from the pressures of self-interest of the majority of the people who live in urban areas.

3. Primarily, it is reflected through legislative and judicial processes at National, State and local levels.

4. Traditional legislative techniques provide grants of power by the States to their local municipalities, with local exercise of that power manifesting many of the areas and details of influence.

5. The United States Supreme Court's interpretations of the general welfare and commerce clauses of the Federal Constitution have resulted in the Federal Government exercising in many different ways hitherto unused powers affecting the concepts and institutions relating to property.

6. In addition to legislation by legislative bodies and sometimes by courts, administrative agencies on Federal, State and local levels have had an important and unprecedented part in developing rules and imposing controls which affect realty.

7. The influence of the metropolis has resulted in the intervention of National, State and local governments into areas which formerly were those of private business and of individual free action.

8. The circumstance that many people have gathered in cities has created some new concepts, rules and institutions relating to property, to supplement the traditional ones which appertain to an agrarian society.

9. Although the growth of the metropolis has created some new concepts, rules and institutions relating to property, it also has put to use more intensive and extensive and somewhat changed concepts, rules and institutions which also are found in an agrarian society.

10. The chief influence of the metropolis on the concepts, rules and institutions relating to property has been a progressive diminution of individual free action concerning private property rights.

11. This has resulted from a corresponding enlargement of social control plus governmental regulation and governmental participation in transactions affecting real property.

12. These influences probably will continue and intensify as the urban population increases, with the result that the long-range effect will be a further lessening of free choices by the individual property owner and a greater measure of social control and governmental participation in affairs relating to property.

13. This process has proceeded and doubtless will continue to proceed at a gradual but uneven rate both as to time and as to places. Its over-all progress will depend upon the social climate of the times. In the words of Mr. Justice Cardozo:

> "This work of modification is gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and the pressure of the moving glacier."[1]

1. Hon. Benjamin N. Cardozo, *The Nature of the Judicial Process*, p. 25.